TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 210

EAST REPUBLICAN, APPELLANT,

vs.

S. HARRISON, AS TREASURER OF THE STATE OF MONTANA

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

FILED JUNE 15, 1931

(33,519)

(33,519)

SUPREME COURT OF THE UNITED STATES

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HART REFINERIES, APPELLANT,

vs.

W. E. HARMON, AS TREASURER OF THE STATE OF MONTANA

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

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IN DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF LEWIS & CLARK

HART REFINERIES, Plaintiff,

vs.

W. E. HARMON, as Treasurer of the State of Montana, Defendant

AMENDED COMPLAINT—Filed March 10, 1926

Plaintiff files this its second amended complaint, and for cause of action alleges:

I

That at all times since on or about the 15th day of April, 1924, the plaintiff has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Missoula, Missoula County, Montana, and at all times herein mentioned has been, and still is, authorized and empowered to engage in manufacturing, refining, producing, and compounding gasoline and distillate, and to sell and distrubute the same; and said corporation, and all of the stockholders thereof, are citizens and residents of the State of Montana.

II

That at all times herein mentioned the defendant has been, has continued to be, and now is, the duly elected, [fol. 3] qualified and acting Treasurer of the State of Montana.

III

That under and by virtue of the provisions of Section 1, 2, 3 and 5 of Chapter 186 of the Laws of the Nineteenth Legislative Assembly of the State of Montana, for the year 1925, the plaintiff was required to pay to the defendant, as the State Treasurer of the State of Montana, a license tax, in an amount equal to two cents for each gallon of

gasoline and two cents for each gallon of distillate refined, manufactured, produced and compounded by the plaintiff as such distributor, and sold by plaintiff in the State of Montana, or shipped, transported or imported by the plaintiff into, and distributed and sold by plaintiff within the State of Montana after it had arrived in and was brought to rest within the State of Montana, whether sold in original packages or in the broken packages, during such year.

IV

That for the quarter ending upon the 30th day of September, 1925, the plaintiff refined, manufactured, produced and compounded and sold in the State of Montana, Three Hundred and Three Thousand Five Hundred and Ninety-two (303,592) gallons of gasoline and distillate. That by reason thereof the plaintiff become liable for a license tax of two cents per gallon upon said quantity of gasoline and distillate, for the quarter ending September 30th, 1925, in the sum of Six Thousand and Seventy-one Dollars and Eighty-four cents ($6,071.84). That the plaintiff did not ship nor transport any gasoline or distillate into the State [fol. 4] of Montana.

V

That on the 30th day of October, 1925, and within thirty days after the end of the quarter ending September 30th, 1925, for which said license tax was due in accordance with the provisions of Section 3 of the said Chapter 186 of the Laws of the State of Montana for the year 1925, the plaintiff paid said sum of Six Thousand Seventy-one Dollars and Eighty-four cents ($6,071.84) to the defendant, as the State Treasurer of the State of Montana, to be held by him pending the outcome of this action to recover the same as paid under written protest that said tax was unlawful, which said sum was so received and accepted by him, and his receipt issued therefor.

VI

That the plaintiff deemed said license tax, and the whole thereof, to be unlawful, and at the time said license tax was paid, and before said tax became delinquent, the plain-

tiff paid said tax in said sum of Six Thousand Seventy-one Dollars and eighty-four cents ($6,071.84), to the defendant as State Treasurer of the State of Montana, under written protest that the same was unlawful, and said defendant received and accepted the same as so paid.

VII

That during all of the times herein mentioned the Continental Oil Company, Spokane Oil & Refining Company, the Pure Oil Company, the Mid-West Refining Company, The Producers and Refiners Company, the Standard Oil Company of California, and the Utah Oil Refining Company, and other corporations, have been, and each thereof now is, respectively, a corporation organized and existing under and by virtue of the laws of some State of the United States other than the State of Montana, but that the defendant [fol. 5] is not informed as to the State under the laws of which said corporations or any of them are organized, and that each and all of said corporations at all times herein mentioned has been and still is authorized to do business in the State of Montana, under the laws thereof applicable to foreign corporations.

VIII

That on and prior to the first day of April, 1925, said corporation and each thereof were, and at all times since, have been and now are engaged in the manufacturing, refining, producing and compounding of gasoline and distillate at places within the United States outside of the boundaries of the State of Montana, and that during said time they were engaged in the shipment and transporting into the State of Montana of gasoline and distillate, great quantities of which were sold by them outside of the State of Montana, and also great quantities of which were so sold within the State of Montana, before it was brought to rest in the State of Montana, to persons, corporations and concerns within this State.

IX

That during all of said time the said corporations mentioned in Paragraphs VII and VIII have had and maintained within the borders of their respective states out-

side of the State of Montana, and also within the State of Montana, their respective places of business from which they, and each of them, have at all times herein mentioned and have continued until the present time, to make sales of gasoline and distillate within said respective states outside of the State of Montana, and also within the State of Montana, before it arrives in and was brought to rest in Montana, for delivery, and which have been delivered at [fol. 6] all times since the first of April, 1925, and prior thereto, by such respective corporations, to persons, corporations, dealers, consumers and users in the State of Montana, and in the County of Missoula, and the territory occupied by plaintiff, in large quantities, to wit: to various of such parties in quantities during the period from April 1st, to June 30th 1925, and from July 1st to September 30th, 1925, ranging from One Hundred Thousand (100,000) gallons for said respective corporations, parties and persons, and up to and at the rate of 400,000 gallons a year, and amounting in the aggregate to several million gallons.

X

That by the sale of such gasoline and distillate so sold, before the same has arrived and been brought to rest in Montana, to corporations, persons and concerns within this State in the manner aforesaid, said corporations, persons and concerns, engaged in such sales have been at all times since the first day of April, 1925, and still are, competing with this plaintiff in the sale of gasoline and distillate to persons and concerns residing and doing business within said state of Montana.

XI

That said plaintiff began manufacturing, refining and compounding of gasoline and distillate at its refinery at the City of Missoula, in the County of Missoula, Montana, on or about the 15th day of April, 1924, and has been so engaged therein at all times thereafter, and has at all times since said date sold gasoline and distillate to its customers and patrons in the State of Montana.

XII

That none of the persons, corporations or concerns, men-
[fol. 7] tioned in Paragraph VII and VIII of this complaint, and engaged in the manufacturing, refining and compounding of gasoline and distillate, and the transportation and shipment of the same into the State of Montana, and the sale thereof inside or outside of the State of Montana to their respective customers within the State of Montana, before the same has arrived and been brought to rest in the State of Montana, and then resold, has been, or is required to pay to the State Treasurer of the State of Montana the sum of two cents per gallon, nor any other sum whatsoever as a license tax or any other tax upon the sale of said gasoline and distillate.

XIII

That in addition to the above named foreign corporations, other companies, organized under the laws of the State of Montana and elsewhere, and individuals, the names of which said corporations and individuals are unknown to this plaintiff, were, on and prior to said first day of April, 1925, and ever since have been, and now are, engaged in the State of Montana in the selling and distribution of gasoline and distillate to persons residing within said state.

XIV

That the plaintiff being a "distributor", as said term is herein used, means and includes every corporation engaged in the business in the State of Montana of refining, manufacturing, producing and compounding of gasoline and distillate and selling the same in this state and hereinafter designated as "manufacturing distributor."

XV

That besides said foreign manufacturer and distributor hereinbefore mentioned and said "manufacturing distributor" there are other competitors of plaintiff designated herein as "non-manufacturing distributors" and "dealers."

XVI

[fol. 8] That said "non-manufacturing Distributors" as herein used, means and includes every person and corporation who engages in the business in the State of Montana of shipping, transporting or importing any gasoline or distillate and making original sales of the same in this state.

XVII

That the term "dealer" as herein used, means and includes every person and corporation (other than said manufacturing distributor and non-manufacturing distributor) who engages in the business in the State of Montana of distributing and selling gasoline and distillates within this State.

XVIII

That the plaintiff is a manufacturing distributor, engaged in the manufacture and sale of gasoline and distillate in the State of Montana; that the plaintiff has a refining and manufacturing plant at Missoula, Montana, and manufactures and sells said products in the City of Missoula and in the territory of Western Montana, extending to the Idaho and Canadian lines, tributary to its said location; that under said law the plaintiff is liable for the payment of two cents per gallon upon every gallon of gasoline and distillate manufactured and sold, for the privilege of conducting its said business. That the said corporations mentioned in Paragraphs VII and VIII are competitors of plaintiff in the State of Montana, and solicit and ship orders to dealers and non-manufacturing distributors in Montana of gasoline and distillate in the territory of plaintiff in the State of Montana, and to consumers in said territory, and sell said products before they arrive and are brought to rest in the State of Montana, and the said corporations being competitors of plaintiff, in its said territory, from neighboring states, so sell, transport and ship the same into the State of Montana, and in the territory of plaintiff, at a [fol. 9] price of two cents per gallon less than the market price, by deducting and having deducted the two cents per gallon, which plaintiff is required to pay under said law, but which neither said competitors of plaintiff, said dealers, non-manufacturing distributors or consumers are required

to pay on such as is transported from without the state and is not resold after being brought to rest in Montana. That by reason of this discrimination of two cents per gallon, plaintiff is unable to compete with said corporations from other states in the territory of plaintiff in securing the business of non-manufacturing distributors, dealers, users and consumers in plaintiff's territory in Montana. That among the important consumers for whose business plaintiff is unable to compete in its territory by reason of their exemption from said tax when they buy gasoline which is shipped from out of the State, but purchased before it has been brought to rest in this state, are the Chicago, Milwaukee and St. Paul Railway Company and the Northern Pacific Railway Company, who, prior to the enactment of said law, were important and profitable customers of plaintiff, but whose business by reason of the premises has been lost to plaintiff.

XIX

That the plaintiff as such manufacturing distributor engaged in the manufacture and sale of gasoline and distillate in this State is required to pay said license tax of two cents per gallon for every gallon manufactured and sold for the privilege of conducting its business; that its competitors mentioned in Paragraphs VII and VIII are established in neighboring states; that said non-manufacturing distributors and dealers are also engaged in the business in this State, in the territory of plaintiff, of distributing and selling gasoline and distillate within the state; that said com- [fol. 10] petitors named in Paragraphs VII and VIII and XVI solicit orders for and ship to dealers and consumers in Montana, large quantities of gasoline and distillate sold in Montana before it has arrived and is brought to rest in Montana, and also large quantities of gasoline and distillate sold in the said neighboring state before it has been brought to rest in the State of Montana; that besides being such dealers in the sale and delivery of said gasoline and distillate, many of the said dealers operate other lines of business requiring the use of many delivery automobiles in delivering gasoline to their customers, their own service stations located over several counties, running delivery trucks for mercantile businesses owned by them, besides running touring cars and trucks for their own use and en-

joyment; that said dealers respectively use large amounts of gasoline for their own consumption and use, that if such dealers purchase their supplies from the plaintiff or other Montana manufacturing distributors, the license tax of two cents is payable on all such sales, which are required to be reported by the plaintiff; when, however, such dealers and consumers purchase their supplies from said competitors of plaintiff who sell and ship same from neighboring states, or sell the same before it is brought to rest in Montana, the dealer receives the same, delivered to him in Montana, tax free, and the tax is not required to be met on such sales, as is required of the plaintiff and Montana manufacturing distributors. That the dealer being absolved from all tax until required to be reported by him within thirty days after the end of the quarter, and then, for such quantity only as has been resold by such dealer, as is provided by Sections 2383 and 2384, as amended by Sections 2 and 3 of Chapter 186 of the Laws of 1925 of the State of Montana, such dealers are entitled to have all that they procure for their own consumption and use tax free; that neither [fol. 11] such dealers, foreign corporations or non-manufacturing distributors nor consumers of gasoline and distillate in Montana are required to pay the tax of two cents per gallon on such gasoline as is purchased by them before it is brought to rest in Montana, and are not required to pay a tax upon such imported gasoline and distillate they sell before the same has arrived in and is brought to rest in Montana; that by reason thereof not only said foreign corporations and non-manufacturing distributors, but the said dealers, who are also competitors of plaintiff in the sale and distribution of gasoline in plaintiff's territory, solicit orders and sell such gasoline and distillate tax free, as has been purchased by such dealers and resold by them before it comes to rest in Montana, and thereafter delivered from a foreign state direct in original packages to the consumer, or upon such resales as the dealer may make before it comes to rest in Montana, and thereafter delivered, either in broken or unbroken packages. The Montana dealer may purchase gasoline before it comes to rest in Montana resell the same before it has come to rest in Montana, and then after it has come to rest in Montana deliver the same either in broken or unbroken packages, tax free. That by

reason thereof, and of the premises, such dealers and consumers cease and refuse, and have ceased and refused, to purchase from Montana manufacturing distributors, and from plaintiff, but purchase from plaintiff's said competitors. That such non-manufacturing distributors and dealers located in Montana, who purchase from the plaintiff or a Montana manufacturing distributor, gasoline and distillate, which carries said two cent per gallon tax, is unable to compete with the non-manufacturing distributor, or dealer located in Montana, who purchases said gasoline and distillate before it has arrived in and is brought to rest in the [fol. 12] State of Montana, which is free from said two cent tax and any tax whatsoever. By reason thereof, and of the premises, the plaintiff and the Montana Manufacturing distributors who manufacture and refine their gasoline and distillates, in the State of Montana, are unjustly discriminated against, and plaintiff's customers have been, and now are, lost to the plaintiff and by reason of the premises and the said tax of two cents per gallon plaintiff has to pay which his said competitors are not required to pay, the plaintiff is unjustly and arbitrarily discriminated against by reason of being a manufacturer and general taxpayer in the State of Montana and is unable to compete with his said competitors in plaintiff's own territory in securing business of non manufacturing distributors, dealers and consumers in his territory.

XX

That by reason of the premises and on account of the aforesaid discrimination in favor of the said corporations in Paragraphs VII and VIII herein mentioned, and against this plaintiff, the plaintiff during the period from the beginning of its operation April 1st, 1924 to September 30th 1925, lost the sale of a large quantity of gasoline and distillate to persons residing within the State of Montana, upon which said plaintiff would have realized a profit of Three Thousand Dollars ($3,000.00) for the quarter ending June 30, 1925, and a profit of Four Thousand Dollars ($4,000.00) for the quarter ending September 30, 1925; and will, in the future, lose the sale, to persons residing within the State of Montana, of large quantities of gasoline and distillate

monthly, upon which the plaintiff would make a profit of approximately Fifteen Hundred Dollars ($1,500.00) per month.

[fol. 13]

XXI

That by reason of the premises and on account of the aforesaid discrimination in favor of said "non-manufacturing distributors" and "dealers", herein mentioned, and against this plaintiff, the plaintiff during the period from the beginning of its operations April 1st, 1924 to September 30th, 1925, lost the sale of a large quantity of gasoline and distillate to persons residing within the State of Montana upon which said plaintiff would have realized a profit of Three Thousand Dollars ($3,000.00) for the quarter ending June 30, 1925, and a profit of Four Thousand Dollars ($4,000.00) for the quarter ending September 30, 1925; and will, in the future, lose the sale, to persons residing within the State of Montana, of large quantities of gasoline and distillate monthly, upon which the plaintiff would make a profit of approximately Fifteen Hundred Dollars ($1,500.00) per month.

XXII

That the imposition or attempt to impose a license tax at the rate of two cents per gallon upon the gasoline and distillate sold by plaintiff to persons within the State of Montana has been the sole cause of the inability of plaintiff to sell to persons within the State of Montana gasoline and distillate at the prices which have been paid by such persons to the corporations and individuals hereinbefore mentioned, which have shipped, and transported said gasoline and distillate from places outside of the State of Montana into said State as aforesaid, and but for said tax said plaintiff would be able to meet such prices and to sell substantially all the gasoline which it manufactures or has heretofore manufactured, to persons within the State of Montana, but that on account of the imposition of said tax, said plaintiff will be compelled to attempt to develope markets for its said gasoline and distillate so manufactured within the State of Montana, in other States in the United States and [fol. 14] Canada.

XXIII

That the State of Montana does not regulate the manufacturing, refining or compounding of gasoline and distillate, or the sale or distribution thereof within the State of Montana, and no part of the license tax prescribed by the Statutes of this State is used by the State in police regulation or supervision of oil refineries, or the sale or distribution of gasoline and distillate manufactured thereat, but said license tax when paid, is used for similar purposes as the use made of taxes levied upon and against real and personal property in the State of Montana, and such license tax is exacted of the sellers and distributors of gasoline and distillate who manufacture, refine and produce such gasoline and distillate within the State of Montana, for revenue purposes.

XXIV

That by reason of the premises the plaintiff is denied the equal protection of the laws as against its competitors established in other states, in the State of Montana and in plaintiff's territory in Missoula, and Western Montana, and is unable to compete under said law permitting such unreasonable and unlawful discrimination.

XXV

That by reason of the premises and the fact that no license tax or other tax is required to be paid as set forth in this complaint, of two cents per gallon, or otherwise, or at all, upon the sale of such gasoline and distillate, the plaintiff has been and is discriminated against by virtue of the imposition of the license tax of two cents per gallon upon such gasoline and distillate manufactured and refined by it and sold by it to its patrons and customers residing in the State of Montana, and said foreign corporations and plaintiff's competitors purchasing gasoline and distillate before it has come to rest in Montana, and has [fol. 15] then been resold, not being required to stand or to pay such two cents per gallon or any other sum upon such gasoline and distillate so sold, have been and still are able to sell such gasoline and distillate to their said customers at least two cents per gallon less than the plaintiff, and other manufacturing distributors on account of

said license tax, and have at all times been and are able to so sell gasoline and distillate of the same or similar character, to its customers and patrons within this state, and thereby said foreign corporations, non-manufacturing distributors and dealers, so engaged in said business, and corporations organized in states without the State of Montana have been at all times herein mentioned and still are, under the provisions of Sections 2382, 2383 and 2384 of the Revised Codes of Montana, as amended by the provisions of Section One (1), Two (2), and Three (3) of Chapter 186 of the Laws enacted by the Nineteenth Legislative Assembly of Montana, for the year 1925, permitted, within the State of Montana, to exercise and enjoy, within the state of Montana, greater rights, privileges and immunities, under the laws of this State than those enjoyed by plaintiff, a domestic corporation and other manufacturing distributor corporations, of similar character created under the laws of the State of Montana, which is in violation and contravention of Section Eleven (11) of Article XV of the Constitution of the State of Montana. That the provisions of said statutes of the State of Montana, imposing said license tax constitute and are also unjust, unreasonable, and arbitrary discriminations against this plaintiff, and other manufacturing distributors, and such dealers and distributors as purchase from the plaintiff and other manufacturing distributors, located in Montana, in favor of foreign corporations and other corporations and persons, non-manufacturing distributors, dealers and distributors who purchase said gasoline and distillate before it has arrived and been brought to rest in the State of Montana, and the [fol. 16] plaintiff and said manufacturing distributors, and such dealers, persons and distributors as purchase said gasoline and distillate from Montana manufacturing distributors, are denied the equal protection of the law, and said law is not of uniform operation and is not of uniform incidence upon the same class of subjects, to-wit: upon gasoline and distillate sold by corporations organized under the laws of the State of Montana, being manufacturing distributors, within the territorial limitations of the authority of the State of Montana, which levies said tax, and such as is sold in other states to non-manufacturing distributors, dealers and consumers within the State of Montana, before

it has arrived and been brought to rest in the State of Montana, and such as is sold in the State of Montana, before it has arrived and has been brought to rest in the State of Montana, by foreign corporations, non-manufacturing distributors, domestic corporations, dealers and individuals doing business in the State of Montana, and purchasing the same before it has arrived and been brought to rest in the State of Montana, that by reason thereof and of the premises, the said provisions of the said Montana law are in violation and contravention of the following constitutional provisions, to-wit:

Sections One (1), Four (4), Seven (7) and Eleven (11) of Art. XII the Constitution of the State of Montana, and Section Two (2) Article (IV) Four of the Constitution of the United States and Section One (1), Article XIV of Amendments to the Constitution of the United States.

XXIX

That Section 5 of Chapter 186 of said laws of the Legislative Assembly of Montana for the year 1925, whereby it is provided that fifty-five per cent of the money received by the State Treasurer under the provisions of said Act, [fol. 17] shall at the end of each fiscal year be prorated equally among and be paid over to each of the several counties of the State, to the credit and use of the general road funds, and for the maintenance and construction of highways therein, is in violation and contravention of Section 4 of Article XII of the Constitution of Montana, which provides that the Legislative Assembly shall not levy taxes upon the inhabitants or property in any county for county purposes, but it may, by law, invest the corporate authorities thereof with powers to assess and collect taxes for such purposes.

XXX

That the said Section 5 of Chapter 186, wherein it provides that at the end of each fiscal year the State Treasurer shall pro rate among and pay over to each of the several counties of the State fifty-five per cent of said gasoline tax, is violative and in contravention of Article 5, Section 26, of the Constitution of the State of Montana, providing that the Legislative Assembly shall not pass local or special

laws for laying out, opening, altering or working roads or highways. That by reason thereof and of the premises, said license tax imposed is unlawful and void.

XXXI

That the provisions of Sections 2382, 2383, 2384, 2389 and 2392 of the Revised Codes of Montana of 1921, as amended by Section 1, Section 2, Section 3, Section 4 and Section 5 of Chapter 186 of the Nineteenth Legislative Assembly of Montana for the year 1925, are in violation and contravention of Article V, Section 26, of the Constitution of the State of Montana, wherein it is provided that the Legislative Assembly shall not pass local or special laws for assessment or collection of taxes. That by reason thereof and of the premises, the imposition of said gasoline license tax, which is a special tax upon gasoline and dis-[fol. 18] tillate, as distinguished from all other kinds and forms of property, is unlawful and void.

XXXII

That by reason thereof, and of the premises, there is due and owing from the defendant to the plaintiff the said sum of Six Thousand Seventy-one Dollars and Eighty-four cents ($6,071.84) paid by the plaintiff to the defendant under protest as aforesaid, no part of which has been paid, and the plaintiff is damaged in said sum of Six Thousand Seventy-one Dollars and Eighty-four Cents ($6,071.84).

Wherefore plaintiff demands judgment against the defendant for the sum of Six Thousand Seventy-one Dollars and Eighty-four Cents ($6,071.84) damages, and for costs of suit.

John E. Patterson, Attorney for Plaintiff.

In District Court of Lewis and Clark County

Answer to Second Amended Complaint—Filed March 16, 1926

Comes now the defendant in the above entitled action and, for answer to the second amended complaint of plaintiff on file herein, admits, denies and alleges as follows:

Admits the allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI thereof, save and except that defendant denies that the Spokane Oil & Refining Company, Standard Oil Company of California, the McMillan Petroleum Products Company of California, and the Utah Oil Refining Company, or any of them, are authorized to do business in Montana, and alleges that he has insufficient knowledge or information to form a belief as to whether any of the corporations named in paragraph VII of said second amended complaint, or any other corporations or [fol. 19] individuals maintaining their places of business outside of Montana, have, during the times referred to in the second amended complaint, or at any time, been engaged in the shipment or transporting into the State of Montana of gasoline or distillate, or as to whether any of them made sales of gasoline or distillate within their respective states outside of Montana, or within the State of Montana, before it arrived in and was brought to rest within Montana, for delivery to persons, corporations, dealers, consumers, or users, in Montana, or the County of Missoula, in the quantities alleged in paragraph IX thereof, or in any other amount, or as to whether any of said corporations or individuals, during the time referred to in plaintiff's second amended complaint, or at any time, have been competing with plaintiff in the sale of gasoline or distillate to persons residing in, or doing business, in Montana, and therefore, denies the same.

II

Admits, if any of the corporations, referred to in paragraph XII, sell gasoline as therein alleged, they are not required to pay any tax in Montana and, in this connection, alleges that whatever gasoline or distillate, if any, is sold tax free by the person, corporation, and concerns therein mentioned to dealers in the State of Montana, and resold by such dealers in Montana, the dealers are obliged to pay a tax of 2c per gallon upon the sale thereof, whereas the same dealers are not obliged to pay any tax upon gasoline or distillate purchased by them from the plaintiff and resold in the State of Montana; that, by reason thereof, the plaintiff can obtain 2c per gallon more for its gasoline sold

to dealers in Montana, for resale by them, than can the persons, corporation, and concerns therein mentioned.

[fol. 20] III

Admits the allegations of paragraphs XIII and XIV thereof.

IV

Alleges that he has insufficient knowledge or information to form a belief as to the allegations of Paragraph XV thereof.

V

Admits the allegations of paragraphs XVI and XVII thereof.

VI

Admits the allegations of Paragraph XVIII thereof, save and except that defendant alleges that he has insufficient knowledge or information upon which to form a belief as to whether the corporations therein referred to, or any of them, solicit or ship orders to dealers or non-manufacturing distributors of gasoline or distillate in Montana in the territory of plaintiff, or to consumers in said territory, or as to whether they sell said products before they arrive and are brought to rest in the State of Montana, as therein alleged, and therefore, denies the same, and denies that the corporations therein referred to are competitors of plaintiff, and denies that they, or any of them, sell, transport or ship any gasoline or distillate, or either thereof, in the territory of plaintiff at a price of 2c per gallon, or any other price, less than the market price, and denies that, by reason of any discrimination against plaintiff, the plaintiff is unable to compete with said corporations from other states in the territory of plaintiff in securing the business of dealers, non-manufacturing distributors, users, or consumers in plaintiff's territory in Montana, and denies that plaintiff is unable to compete with said other corporations, or any of them, in securing the business of the Chicago, Milwaukee & St. Paul Ry. Co., or the Northern Pacific Ry. Co., or either of them, and alleges that, if plaintiff has lost

the business of said companies, as therein alleged, it was [fol. 21] not due to the statute imposing the tax therein referred to, and it was not due to any discrimination worked by said law against plaintiff.

VII

Admits the allegations of paragraph XIX, save and except that defendant alleges that he has insufficient knowledge or information to form a belief as to whether any of the corporations therein referred to solicit and ship orders for gasoline to dealers or consumers in Montana as therein alleged, or at all, and defendant denies that dealers in the State of Montana cease or refuse, and denies that they, or any of them, have ceased or refuse to purchase gasoline or distillate from Montana Distributors, or from plaintiff, but purchase from plaintiff's competitors by reason of any advantage accorded by the statute in question.

Denies that the Montana refiner, manufacturer, or distributor, or plaintiff, are, or any of them have been, unjustly, or at all, discriminated against; denies that plaintiff's customers have been or are lost to plaintiff by reason of any discrimination in the payment of said tax, or by reason of the quantity of gasoline consumed by dealers tax free as therein alleged, and denies that, by reason of any discrimination, plaintiff is unable to compete with its competitors in plaintiff's territory in securing business of dealers in said territory.

VIII

Denies each and every allegation, matter and thing contained in paragraphs XX, XXI, and XXII thereof, save and except that defendant admits that plaintiff and other distributors of gasoline in Montana realize exorbitant profits from the sale of gasoline, and, if plaintiff lost sales as therein alleged, it undoubtedly lost large sums of money in the way of profits.

IX

Admits that the State of Montana does not regulate the manufacturing, refining or compounding of gasoline or dis-

tillates, or the sale or distribution thereof within the State of Montana.

[fol. 22] Admits the other allegations of paragraph XXIII thereof.

X

Denies each and every allegation, matter and thing contained in paragraphs XXIV and XXV thereof.

XIII

Admits that the tax in question is distributed as provided in Section 5 of Chapter 186 of the Laws of 1925.

Denies specifically each and every other allegation, matter and thing contained in paragraph XXIX thereof.

XIV

Denies specifically each and every allegation, matter and thing contained in paragraphs XXX, XXXI and XXXII thereof.

Save and except as hereinbefore specifically admitted or denied, defendant denies generally each and every allegation, matter and thing contained in plaintiff's second amended complaint.

Further answering said second amended complaint, defendant alleges:

V

Defendant further alleges that, if any discrimination results because of the tax or statute in question, the same is due to the fact that the State of Montana is without authority to impose any tax upon interstate commerce, and the same results, without any hostile intent, to discriminate against plaintiff or against any other distributor or dealer in gasoline in Montana, and without any purpose to intentionally favor any distributor or dealer in any other state.

Wherefore having fully answered plaintiff's second amended complaint, the defendant prays that plaintiff take

nothing by its action, and that the defendant have judgment for his costs of suit herein.

L. A. Foot, Attorney General; A. H. Angstman, As-
[fol. 23] sistant Attorney General, Attorneys for Defendant.

In District Court of Lewis and Clark County

Demurrer to Answer—Filed Aug. 7, 1926

Comes now the plaintiff and demurs to the Answer of the defendant as amended, on file in the above entitled action, on the following grounds:

I

That said answer does not state facts sufficient to constitute a defense to the cause of action set forth in plaintiff's Second Amended Complaint.

Dated this 3rd day of August, 1926.

John E. Patterson, Attorney for Plaintiff.

In District Court of Lewis and Clark County

Order Overruling Demurrer—August 7, 1926

Plaintiff's demurrer to the amended answer of the defendant was this day submitted without argument, by the Court overruled and the plaintiff given 10 days in which to plead further to the answer as amended.

A. J. Horsky, Judge.

To which ruling the plaintiff excepts.

In District Court of Lewis and Clark County

Reply—Filed Aug. 18, 1926

[fol. 24] Comes now the plaintiff in the above entitled action, and for reply to the Answer of the defendant as

amended, on file herein, admits, denies and alleges as follows:

I

Plaintiff denies all new and affirmative matter set forth in said answer, except in so far as the allegations thereof are admissions of allegations of plaintiff's complaint.

Wherefore plaintiff prays judgment as demanded in plaintiff's complaint.

Dated this 7th day of August, 1926.

Duly verified.

John E. Patterson, Attorney for Plaintiff.

In District Court of Lewis and Clark County

Motion for Judgment—Filed Jan. 25, 1927

Comes now the defendant in the above entitled action, and moves the Court for judgment on the pleadings in said action in favor of defendant and against the plaintiff.

L. A. Foot, Attorney General; A. H. Angstman, Assistant Attorney General, Attorneys for Defendant.

In District Court of Lewis and Clark County

Order Sustaining Motion—February 5, 1927

In this cause, hearing on the motion of the defendant for judgment on the pleadings, came on regularly this day, present plaintiff by counsel, John E. Patterson, Esq., and the defendant by counsel, A. H. Angstman, Esq. Whereupon, after arguments by counsel for the respective par-

[fol. 25] ties, Court Ordered that the motion of the defendant for Judgment on the pleadings be and is hereby sustained. Thereupon Court Ordered that the plaintiff be and is hereby given 60 days additional to the time allowed by law, in which to prepare, serve and file bill of exceptions herein.

A. J. Horsky, Judge.

To the Order of the Court that the motion of the defendant for judgment on the pleadings be sustained the plaintiff excepts.

In District Court of Lewis and Clark County

Order to Enter Judgment—February 10, 1927

In this cause, Court this day Ordered that Judgment be entered herein in favor of the defendant and against the plaintiff.

A. J. Horsky, Judge.

To which order the Plaintiff excepts.

In District Court of Lewis and Clark County

Judgment—Filed Feb. 10, 1927

The defendant's motion for judgment on the pleadings in the above entitled action having on the 5th day of February, 1927, come on regularly for hearing, Hon. John E. Patterson appearing on behalf of plaintiff and A. H. Angstman, Assistant Attorney General, appearing on behalf of the defendant, and arguments having been made by respective counsel, and after due consideration and deliberation [fol. 26] the Court sustained defendant's motion for judgment on the pleadings:

Wherefore, by virtue of the law and the premises aforesaid, it is hereby Ordered, Adjudged and Decreed that plaintiff take nothing by its action, and that defendant have judgment against the plaintiff for its cost of suit herein, taxed in the sum of $—, and it is further ordered, Adjudged and Decreed that the plaintiff has no further right, title or interest in or to the sum of $6,071.84 involved in this action, and which was paid by the plaintiff under protest, and it is ordered that said sum be by the defendant State Treasurer taken from the "Protest License Fund" and deposited to the credit of the funds to which it belongs, as provided in chapter 186, Laws of 1925.

A. J. Horsky, District Judge.

To which Plaintiff excepts.

In District Court of Lewis and Clark County

Order Extending Time—April 4, 1927

The Court, by order duly made and given, granted the plaintiff sixty (60) days in addition to the time allowed by statute in which to prepare and serve and present his Bill of Exceptions and proposed Bill of Exceptions.

[fol. 27] In District Court of Lewis and Clark County

Bill of Exceptions and Order Settling Same—Filed April 9, 1927

Be it remembered that the Motion for Judgment on the Pleadings in the above entitled cause in the above entitled Court, came on regularly for hearing on the 5th day of February, 1927, before the Court, Honorable A. J. Horsky, Judge Presiding, John E. Patterson, Esq., Attorney at law, appearing on behalf of the Plaintiff, and Hon. A. A. Angstman, Assistant Attorney General, appearing on behalf of the Defendant, and the following proceedings were had, and the following rulings made, and none other. Exactly here follows the pleadings in the case:

Second Amended Complaint

Reference is hereby made to the Second Amended Complaint set forth in the Judgment Roll at Pages 2 to 18, in accordance with the provisions of Par. d. of Paragraph 5 of Division VII of the Rules of the Supreme Court.

Answer to Second Amended Complaint

Reference is hereby made to the Answer to the Second Amended Complaint set forth in the Judgment Roll at Pages 18 to 22, in accordance with the provisions of paragraph d, of Paragraph 5, of Division VII of the Rules of the Supreme Court.

Demurrer to Answer as Amended

Reference is hereby made to Demurrer to the Answer as Amended set forth in the judgment roll at Page 23.

Order Overruling Demurrer

Title of Court

Title of Cuase

Done in Open Court August 7th, 1926

Plaintiff's demurrer to the amended answer of the defendant was this day submitted without argument, by the Court overruled and the plaintiff given 10 days in which [fol 28] to plead further to the answer as amended.

A. J. Horsky, Judge.

To which ruling the plaintiff excepts.

Reply

Reference is hereby made to the Reply set forth in the judgment roll at pages 23 to 24, in accordance with par. d, of Paragraph 5, Division VII, Rules of the Supreme Court.

Motion for Judgment on the Pleadings

Reference is hereby made to the Motion for Judgment on the Pleadings set forth at page 24 of the Judgment Roll in accordance with the provisions of par. d, of Paragraph 5, Division VII of the Rules of the Supreme Court.

(Minute Entry)

Title of Court

Title of Cause

Done in Open Court February 5th, 1927

In this cause, hearing on the motion of the defendant for judgment on the pleadings, came on regularly this day, present plaintiff by counsel, John E. Patterson, Esq., and the defendant by counsel, A. H. Angstman, Esq., whereupon after arguments by counsel for the respective parties, Court Ordered that the motion of the defendant for judgment on the pleadings be and is hereby sustained. Thereupon Court ordered that the plaintiff be and is hereby given 60 days additional to the time allowed by law, in which to prepare, serve and file bill of exceptions herein.

A. J. Horsky, Judge.

To the order of the Court that the motion of the defendant for judgment on the pleadings be sustained the plaintiff excepts.

[fol. 29]

(Minute Entry)

Title of Court

Title of Cause

Done in Open Court This 10th Day of February, 1927

In this cause, Court this day Ordered that Judgment be entered herein in favor of the defendant and against the plaintiff.

A. J. Horsky, Judge.

To which order the Plaintiff excepts.

Judgment

Title of Court

Title of Cause

...ference is hereby made to the Judgment set forth at ...es 25 to 26 of the Judgment Roll in accordance with ...e provisions of par. d, of Paragraph 5 of Division VII of ...e Rules of the Supreme Court.

To Which Plaintiff excepts.

Service of the foregoing Bill of Exceptions admitted and copy thereof received this 5th day of April, 1927, and further, the defendant admits its correctness, and agrees that the same in foregoing form may be forthwith signed, settled and allowed, and ordered filed.

L. A. Foot, Attorney General; A. H. Angstman, Assistant Attorney General, Attorneys for Defendant.

Order Settling Bill of Exceptions

The foregoing bill of exceptions is full, true and correct and contains all of the pleadings introduced, and all other proceedings had, at the hearing of said Motion for Judgment on the Pleadings; it is now signed, settled and al-

[fol. 30] lowed as such, and ordered filed in the cause by the Clerk.

Dated at Helena, Montana, this 9th day of April, 1927.

A. J. Horsky, Presiding Judge.

Filed before settlement April 5, 1927.
Filed after settlement April 9th, 1927.

In District Court of Lewis and Clark County

Notice of Appeal—Filed Aug. 1, 1927

You will please take notice that the Hart Refineries, the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State of Montana, from the judgment therein entered, in the said District Court, on the tenth day of February, 1927, in favor of the defendant in said action, and against said Hart Refineries, plaintiff, and from the whole thereof.

Dated this 26th day of July, 1927.

Yours, etc., John E. Patterson, Attorney for Plaintiff.

To the Clerk of said District Court and L. A. Foot, Attorney for Defendant.

Receipt of copy of notice of appeal acknowledged August 2, 1927.

L. A. Foot, Attorney for Defendant.

In District Court of Lewis and Clark County

Praecipe for Transcript of Record—Filed Sept., 1927

You will please prepare and certify a transcript on appeal [fol. 31] to the Supreme Court of the State of Montana from the Judgment entered in the above entitled action on the 10th day of February, 1927, said transcript to be in conformity with the rules of the Supreme Court and to embrace and include the following papers, records and minutes in said cause, to-wit:

1. The judgment roll containing:
(a) The second amended complaint.
(b) Answer to the Second Amended Complaint.
(c) Demurrer to the Answer as Amended.
(d) Order Overruling Demurrer.
(e) Reply to the Answer.
(f) Motion for Judgment on the Pleadings.
(g) Order Sustaining Motion for Judgment on pleadings.
(h) Order that Judgment be entered for defendant.
(i) Judgment.
(j) Certificate to Judgment Roll.
(k) Minute Entry extending time to prepare Bill of Exceptions.
(l) Bill of Exceptions.
Order Settling Bill of Exceptions.
Filing Bill of Exceptions.
(m) Notice of Appeal.
(n) Præcipe for Transcript.
(o) Your certificate to this transcript.

Dated this 20th day of September, 1927.
John E. Patterson, Attorney for Plaintiff.

[fols. 32 & 33] Certificate to foregoing transcript omitted in printing.

[fol. 34] In Supreme Court of Montana

Hart Refineries, a Corporation, Appellant,

vs.

W. E. Harmon, as Treasurer of the State of Montana, Appellee

Assignments of Error

1. The Court erred in overruling plaintiff's demurrer to the defendant's answer, for the reason that the provisions of the Montana gasoline tax law, upon which said tax was based, were unconstitutional and void by reason of which appellant was injured in its business in the respects hereinafter set forth.

2. The Court should have held sections 2382 and 2383 of Chapter 186 of the Laws of 1925, void, as being in violation, and contravention of the provisions of Section One (1) of Article Fourteen (14) of Amendments to the Constitution of the United States, which provides: "No State shall make or enforce any law, which shall deny to any person within its jurisdiction the equal protection of the laws."

4. The court should have held that said tax denied appellant the equal protection of the laws.

[fol. 35] In Supreme Court of Montana, December Term, 1927

HART REFINERIES, Plaintiff and Appellant,

vs.

W. E. HARMON, as State Treasurer of the State of Montana, Defendant and Respondent

OPINION AND JUDGMENT—Filed Jan. 31, 1928

[fol. 36] Mr. Justice GALEN delivered the opinion of the Court:

Under protest the plaintiff paid unto the defendant as state treasurer, for the quarter ending September 30, 1925, a license tax, pursuant to the provisions of Chapter 186 of the Laws of 1925, in an amount equal to two cents on each gallon of gasoline and distillate "refined, manufactured, produced and compounded by the plaintiff" and by it sold in the state, "or shipped, transported or imported by the plaintiff into, and distributed and sold by the plaintiff within the state of Montana after it had arrived in and was at a state of rest within the state * * * whether sold in original packages or in * * * broken packages." This action was instituted to recover the tax so paid. Judgment was entered upon the pleadings in defendant's favor and appeal is by the plaintiff prosecuted therefrom.

It is the plaintiff's contention that the statute upon the authority of which the tax was collected is unconstitutional. It is urged that it discriminates between Montana products

and those imported into the state; that it is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States; and also, section 11 of Article XII, section 11 of Article XV and section 26 of Article V of the state constitution. Section 1 of the Fourteenth Amendment, so far as applicable, provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor, (shall any state) deny to any person within its jurisdiction the equal protection of the laws." Section 11 of Article [fol. 37] XII of the state constitution provides that "taxes shall be levied and collected by general laws and for public purposes only," and that "they shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." Section 11 of Article XV of the state constitution denies to foreign corporations engaged in business in this state "any greater rights or privileges than those possessed or enjoyed" by domestic corporations; and section 26 of Article V of our constitution restricts the legislative assembly, among other things, from passing a local or special law where a general law can be made applicable.

The statute provides: "As used in this Act, the term 'person' means and includes every individual, firm, association, joint stock company, syndicate and corporation. The term 'distributor' means and includes every person who engages in the business in the state of refining, manufacturing, producing, or compounding gasoline or distillate, and selling the same in this state; and also every person who engages in the business in this state of shipping, transporting or importing any gasoline or distillate into, and making original sales of the same, in this state. The term 'dealer' means and includes every person, other than a distributor, who engages in the business in this states, of distributing or selling gasoline or distillate within the state." (Sec. 2381, R. C. 1921.)

The Act under attack (Chap. 186, Laws of 1925) is amendatory of the provisions of sections 2382, 2383, and 2392 of the Revised Codes of 1921, whereby it is provided, so far as pertinent here, that "every distributor shall pay * * * to the state treasurer a license tax for engaging in and carrying on such business in this state, in an amount

[fol. 38] equal to two cents for each gallon of gasoline, and two cents for each gallon of distillate refined, manufactured, produced or compounded by such distributor and sold by him in this state, or shipped, transported or imported by such distributor into, and distributed and sold by him within this state, after it had arrived in and was brought to rest within this state, whether sold in the original packages or in the broken packages, during such year, provided that all gasoline and distillate distributed by any distributor to any of its service stations in this state shall be deemed to have been sold, and shall be treated and considered, in computing such license tax in the same manner as though the same had been sold to dealers or other persons." (Sec. 2382) "Every dealer shall * * * when engaged in such business in this state, pay to the state treasurer * * * a license tax for engaging in such business in this state, equal to two cents for each gallon of gasoline and two cents for each gallon of distillate sold or distributed by such dealer in this state during such year, provided however, that no gasoline or distillate sold by such dealer, which was purchased by him from a producer who had paid the tax theron, shall be included or considered in determining the amount of such license tax to be paid by such dealer, but only such gasoline and distillate as was shipped, transported or imported into this state and purchased by such dealer, before it had arrived in and was brought to rest within this state and then resold by such dealer, whether in the original packages or in broken packages, shall be included or considered for the purpose of computing the amount of such license tax." (Sec. 2383.)

The principal contention is that the law is discriminatory. Upon similar onslaught this Act has been by this court held to be unconstitutional (State v. Silver Bow Re-[fol. 39] fining Co., —Mont.,—; 252 Pac., 301.), and notwithstanding the elaborate brief and argument of learned counsel for the appellant, we see no good reason to change our views in this regard.

1. The statute is not violative of the Fourteenth Amendment to the Constitution of the United States. (State v. Silver Bow Refining Co., supra., That which would invalidate the law because of unjust discrimination has been thoroughly considered in the case last cited, and in the two cases

entitled State v. Sunburst Refining Co., 73 Mont. 68, 235 Pac. 428; 76 Mont. 472, 248 Pac. 186.

The law is now settled. As was well said by Mr. Justice Matthews, speaking for this court in the Silver Bow Refining Company case, "as to the contention that products may be imported into the state for consumption without the payment of a tax, and thus users are induced to deal with outside concerns when their needs are sufficiently great to warrant buying in bulk and thus withdraw their patronage from dealers within the state, the situation is one which cannot be remedied by state legislation. By sections 9 and 10, Art. I, of the Constitution of the United States, the regulation of interstate commerce is granted exclusively to the Congress; Congress has long since acted on the subject, and "the states have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control, the Operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." "Equal protection of the law is seldom, if ever, obtained; and because of the very frailty of human agencies, the authorities all recognize the right of the legislative branch of government to make reasonable classification of [fol. 40] subjects, for property or *or* occupation taxes (Hilger v. Moore, 56 Mont. 146, 182 Pac. 477), and if the classification is reasonable and if all of the subjects within a given class are accorded the same treatment, the legislation cannot be said to deny to anyone within such class the equal protection of the law, even though the burden imposed upon him may be more onerous than that imposed upon a member of another class. (Quong Wing v. Kirkendall, 39 Mont. 64, 101 Pac. 250; S. C., 223 U. S. 59, 56 L. Ed. 350, 32 Sup. Ct. Rep. 192; see also Rose's U. S. Notes)" (State v. Sunburst Refining Co., 73 Mont. 68, 235 Pac. 428.)

Under the authority of the case of Sonneborn Bros. v. Cureton, 262 U. S. 506, 67 L. Ed. 1095, "it may be accepted • • • as settled beyond all further controversy that gasoline or distillate brought into this state from a sister state and stored in the original packages, afterward to be sold in this state, is no longer an article in interstate commerce, but is merely property in this state, and as such does not enjoy any greater privilege or immunity than gasoline or distillate manufacured in this state. In other words, such gasoline or distillate, though brought here from another state and held in the original packages for sale in this state,

is subject to a property tax, or may be made the basis of an occupation tax, the same as gasoline or distillate manufactured in this state." (State v. Sunburst Refining Co., 73 M 68, 235 P. 428.) "It is enough that the classification is reasonably founded in the 'purposes and policies of taxation.'" (Watson v. State Comptroller, 254 U. S. 122, 65 L. Ed. 170, 41 Sup. Ct. Rep. 43.) It is not open to objection unless it precludes the assumption that the classification was made in the exercise of legislative judgment and discretion." (Stebbins v. Riley, 268 U. S. 137, 69 L. Ed. 884; Campbell v. California, 200 U. S. 87, 50 L. Ed. 382.)

[fol. 41] Referring to the Act under consideration here, this court has heretofore expressed opinion that it eliminates most, if not all, of the objectionable features contained in the statute before amendment. (State v. Sunburst Refining Co., 73 Mont. 68, 235 Pac. 428.) And it is noteworthy that the later Act of 1927, (Laws 1927, p. 604) in the language by it employed, is an improvement upon the statute here considered.

2. As to just how the Act is violative of the various provisions of the state constitution counsel have neither favored us with argument or authority. We have carefully considered and applied our constitutional provisions above alluded to, and do not find the Act in violation of any thereof. It is a general law for public purposes, is uniform in its application, and therefore cannot be considered as violative of section 11 of Article XII. By its provisions a foreign corporation is not given greater rights or privileges than those enjoyed by a domestic corporation. The act applies to both domestic and foreign corporations alike. The situation is one which the state must meet as equitably as possible in deference to paramount authority. (State v. Silver Bow Refining Co., supra.) In this instance it has done so.

In our opinion the provisions of section 11 of Article XV are not so transgressed as to nullify the Act. It is not a local or special law, but rather a general statute, and therefore argument to the effect that it is violative of the provisions of section 26 of Article V is wholly without merit.

[fol. 42] The judgment is affirmed.

Albert J. Galin, Associate Justice.

We concur: Lew L. Callaway, Chief Justice. Henry L. Myers, Albert P. Stark, John A. Matthews, Associate Justices.

[fol. 43] SUPREME COURT OF MONTANA

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed April 27, 1928

Petition for Appeal

Considering itself aggrieved by the final judgment of the Supreme Court of the State of Montana in the above entitled cause the appellant herein, Hart Refineries, a Corporation, hereby prays for an order that an appeal be allowed appellant to the Supreme Court of the United States, and for an order directing the Honorable Judges of the Supreme Court of Montana, under the seal, to send the record, proceedings and judgment aforesaid, with all things concerning the same and the order allowing an appeal, and all things relating to said appeal, to the Supreme Court of the United States, and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said Hart Refineries, appellant, assigns the following errors in the record and proceedings of the said case.

[fol. 44] The Supreme Court of the State of Montana erred in rendering judgment in favor of appellee, and against appellant as follows:

First. The Supreme Court of the State of Montana erred in overruling plaintiff's demurrer to the defendant's answer for the reason that the provisions of the Montana Gasoline Tax Law, upon which said tax was based, were unconstitutional and void, by reason of which appellant was injured in its business in the respect hereinafter set forth.

Second. The Supreme Court of the State of Montana should have held Sections 2382 and 2383 of Chapter 186 of

the Laws of 1925 of Montana void as being in violation and contravention of the provisions of Section 1, Article 14 of Amendments to the Constitution of the United States, which provides: "No state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws."

Third. The Supreme Court of the State of Montana should have held said tax denied appellant the equal protection of the laws.

Prayer for Reversal

For which errors, the appellant, Hart Refineries, prays that said judgment of the Supreme Court of the State of Montana dated January 31st, 1928 in the above entitled cause, be reversed and a judgment rendered in favor of said appellant for the amount demanded in its complaint and for costs.

John E. Patterson, Attorney for Appellant.

[File endorsement omitted.]

[fol. 45] In Supreme Court of Montana

[Title omitted]

Order Allowing Appeal—Filed April 27, 1928

Because in the record, proceedings and judgment in a cause lately pending in the Supreme Court of the State of Montana being the highest court of said state in which a decision in the cause could be had, between Hart Refineries, a corporation, appellant, and W. E. Harmon, as Treasurer of the State of Montana, appellee, wherein was drawn in question the validity of a statute of the State of Montana, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity; It appears to me, the undersigned, Chief Justice of the Supreme Court of the State of Montana, that the said Hart Refineries, a corporation, appellant, having presented to me its petition for allowance of an appeal

from said judgment of the Supreme Court of the State of Montana to the Supreme Court of the United States, together with Assignment of Errors and Prayer for Reversal to that end: and it appearing that said Hart Refineries, appellant, is entitled to have said judgment reviewed by the Supreme Court of the United States; and is entitled to an order allowing an appeal, and being willing that error, if [fol. 46 & 47] any hath occurred, should be duly corrected and full and speedy justice done to the parties aforesaid, I do hereby order that an appeal be allowed appellant to the Supreme Court of the United States, and I do hereby order a bond to be furnished by appellant which I fix at the amount of $1,000.00 to be approved by me, and I do in consideration of the premises, to you the Honorable Judges of the Supreme Court of the State of Montana, Greeting:

Command you that under your seal, distinctly and openly, send the record, proceedings and judgment aforesaid with all things concerning the same, and all things relating to this appeal to the Supreme Court of the United States, together with this order allowing an appeal, and that you have the same in the said Supreme Court at Washington, D. C. within sixty days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness, my hand this 27th day of April, 1928.

Lewellyn L. Callaway, Chief Justice of the Supreme Court of the State of Montana.

[File endorsement omitted.]

[fols. 48 & 49) Citation, in usual form, showing service on L. A. Foot and others, omitted in printing.

[fol. 50] Bond on appeal for $1,000, approved and filed May 2, 1928, omitted in printing.

[fol. 51] SUPREME COURT OF MONTANA

[Title Omitted]

PRAECIPE FOR RECORD—Filed May 16, 1928

The Clerk of the Supreme Court of the State of Montana is hereby directed to prepare and certify a transcript of the record of the above entitled cause for the use of the Supreme Court of the United States, by including therein the following:

I. The judgment roll containing:

(a) The second amended complaint.

(b) The answer to the second amended complaint.

(c) Demurrer to answer as amended.

(d) Order overruling demurrer.

(e) Reply to answer.

(f) Motion for judgment on the pleadings.

(g) Order sustaining motion for judgment on the pleadings.

(h) Order that judgment be entered for defendant.

(i) Judgment.

(j) Certificate to judgment roll.

(k) Minute entry extending time to prepare bill of exceptions.

(l) Bill of exceptions.

(j) Order settling bill of exceptions.

(k) Filing bill of exceptions.

II. Notice of Appeal.

[fol. 52] III. Assignments of error, as follows:

The District Court erred in rendering judgment in favor of respondent, and against appellant, as follows:

(1) The Court erred in overruling plaintiff's demurrer to the defendant's answer, for the reason that the provisions of the Montana Gasoline Tax Law, upon which said tax was based, were unconstitutional and void, by reason of which appellant was injured in its business.

(2) The Court should have held Section 2382 and 2383 of Chapter 186 of the Laws of 1925 void, as being in Violation and contravention of the provisions of Section One of Article Fourteen of Amendments to the Constitution of

the United States, which provides: "No state shall make or enforce any law, which shall deny to any person within its jurisdiction the equal protection of the laws."

(4) The Court should have held the said tax denied appellant the equal protection of the laws.

IV. The opinion of the Supreme Court of the State of Montana, delivered by the Court in deciding said cause on appeal, and the date thereof.

V. Petition for appeal from the Supreme Court of the State of Montana, to the Supreme Court of the United States, including "Assignment of Errors" and "Prayer for Reversal."

VI. Order allowing appeal by Chief Justice of the Supreme Court of Montana, fixing bond and directing that the record be sent to the Supreme Court of the United States.

VII. Citation to appellee with acceptance of service.

[fol. 53 & 54] VIII. Bond of appellant, with approval and notation that same to act as supersedeas.

IX. Original petition for appeal from the Supreme Court of the State of Montana to the Supreme Court of the United States, attached to record.

X. The Original Order allowing appeal by the Chief Justice of the Supreme Court of Montana, fixing amount of bond and directing that the record be sent to the Supreme Court of the United States, attached to record.

XI. This praecipe and acceptance of service, or proof of service thereof.

XII. Your certificate to the foregoing.

Dated this 8th day of May, A. D. 1928.

John E. Patterson, Attorney for Appellant.

Due service and filing of the foregoing praecipe is accepted and receipt of a copy thereof is acknowledged this 6th day of May, 1928.

L. A. Foot, Attorney General for the State of Montana; A. H. Angstman, Ass't Att'y Gen. of Montana, Attorneys for Appellee.

[fol. 55] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 56-58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1928

No. 210

HART REFINERIES, a Corporation, Appellant, vs. W. E. HARMON, as State Treasurer of the State of Montana, Appellee

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June 19, 1928

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

John E. Patterson, Attorney for Appellant.

Due service of the foregoing statement of points to be relied upon and designation of the parts of the record to be printed is accepted and receipt of a copy thereof acknowledged this 13th day of June, A. D. 1928.

L. A. Foot, Attorney General of Montana; A. H. Angstman, Assistant Attorney General of Montana, Attorneys for Appellee.

Endorsed on cover: File No. 33,519. Montana Supreme Court. Term No. 210. Hart Refineries, Appellant, vs. W. E. Harmon, as Treasurer of the State of Montana. Filed June 16th,1928. File No. 33,519.

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Foster-Creighton Co. v. Graham, 47, A. L. R., 971, 258 S. W. 971, 975, 977 ..... 32, 33

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1928

No. 210

HART REFINERIES, a Corporation,

Appellant,

vs.

W. E. HARMON, as
TREASURER OF THE STATE OF MONTANA,

Appellee.

Appellant's Brief

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BRIEF OF APPELLANT.

1. The above entitled case was decided in the Supreme Court of Montana on the 31st day of January, 1928, and is reported under the title Hart Refineries, Appellant, v. Harmon, Appellee, 81 Montana, 423.

STATEMENT DISCLOSING JURISDICTION TO REVIEW.

2. It is contended that the Court has jurisdiction to review on appeal the judgment of the Supreme Court of Montana, upon the following grounds:

It is an appeal from the Highest State Court of Montana, wherein there has been drawn in question the validity of a statute of Montana, on the ground of its being repugnant to the provisions of Section One of the 14th Amendment to the Constitution of the United States, providing that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws, and the decision of the Supreme Court of Montana was in favor of its validity.

(a)

The statutory provision believed to sustain the jurisdiction of this Court is as follows:

28 U. S. C. A. Sec. 344, Judicial Code Sec. 237, provides as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where it is drawn in question the validity of a statute of, or an authority exercised

> under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon writ of error."

(b)

A. The date of judgment sought to be reviewed was January 31st, 1928 (R. 26).

B. The petition for appeal to the Supreme Court of the United States was presented to the Chief Justice of the Supreme Court of Montana, and allowed by him on the 27th day of April, 1928.

(c)

Appellant's contention is that the Montana Gasoline License Tax Law of the year 1925 taxed the Montana refiner two cents a gallon on all gasoline and distillate he manufactured and sold. It permitted gasoline manufactured in sister states to be shipped into Montana, but required no tax on any such gasoline which was not sold after it had reached a state of rest in Montana. This permitted all gasoline and distillate transported from sister states, which was not resold, after reaching Montana, but which was used or consumed in the state, to avoid the tax. Consumers and dealers were not required to pay a tax on such as they used or consumed, but did not sell. That such discrimination could have been avoided by extending the law to include all gasoline and distillate used in Montana after its interstate character had ceased, and it had come to rest. Such law would have been valid and not in conflict with the Interstate Commerce Clause of the Constitution; but the Montana Court nevertheless held that to tax the use of

gasoline transported from a sister state, after it had reached a state of rest and its interstate commerce status ended, would still interfere with interstate commerce, and be valid.

This was an action brought by Hart Refineries to recover the sum of $6,071.84 (R. 1-14) required of appellant under the Gasoline License Tax Law of the State of Montana for the year 1925 (Mont. 1925, 359, 360). The tax was paid under written protest that the same was unlawful and so received by the State Treasurer. (R. 2, 3. Pars. V, VI). The ground of protest that said tax was unlawful, was that the provisions thereof permitted persons and corporations (R. 5, 6, 7. Pars. XII, XIII) refining gasoline in sister states, and making sales inside and outside the state, before gasoline products were resold, after being brought to rest in Montana, did not require the payment of the gasoline tax of two cents per gallon; that (R. 6, 7. Par. XVIII) plaintiff, who is a Montana Refiner, designated as a manufacturing distributor, was required to pay the tax of two cents per gallon on all gasoline products he manufactured and sold, but refiners from sister states who were competitors of plaintiff were permitted to ship to non-manufacturing distributors, dealers and consumers in Montana, said tax being avoided on all that was not resold after being brought to rest in Montana. That by reason of this discrimination, plaintiff could not compete with his competitors in securing the business of non-manufacturing distributors, dealers and consumers in Montana in plaintiff's territory. That (R. 7, 8. Par. XIX), the competitors from other states sell their products both before and after they arrive in Montana, but no tax being required on such as is not sold after it has reached a state of rest in

Montana, permits all that is transported into the state, and used or consumed, to avoid the tax. Dealers are not required to pay a tax on what they use, and use gasoline for their own delivery trucks, tank wagons, and automobiles for the distribution of their gasoline to their stations over several counties, and such as they use in other lines of mercantile business owned by them, tax free. If such dealers buy of plaintiff or the Montana refiner he has to pay the tax, so will not patronize the Montana refiner. That by reason of the discriminations the manufacture and sale of gasoline in the state by Montana refiners is unjustly and arbitrarily discriminated against.

(R. 11. Par. XXIV). That by reason of the premises plaintiff is denied the equal protection of the laws, and is unable to compete under said law permitting such unreasonable and unlawful discrimination.

(R. 12. Par. XXV). Not only the Montana refiner, but also such dealers, persons and distributors as purchase said gasoline and distillate from Montana manufacturing distributors, (refiners), are denied the equal protection of the law.

That by reason of the premises (R. 13), the said provisions of the said Montana law, are in violation and contravention of the following Constitutional provisions, to-wit:

Section One (1), Article XIV of Amendments to the Constitution of the United States.

The appellant assigned errors of the Supreme Court of Montana, as follows: (R. 32, 33)

"ASSIGNMENTS OF ERROR

And the said Hart Refineries, appellant, assigns the following errors in the record and

proceedings of the said case.

The Supreme Court of the State of Montana erred in rendering judgment in favor of appellee, and against appellant as follows:

First. The Supreme Court of the State of Montana erred in overruling plaintiff's demurrer to the defendant's answer for the reason that the provisions of the Montana Gasoline Tax Law, upon which said tax was based, were unconstitutional and void, by reason of which appellant was injured in its business in the respect hereinafter set forth.

Second. The Supreme Court of the State of Montana should have held Sections 2382 and 2383 of Chapter 186 of the laws of 1925 of Montana void as being in violation and contravention of the provisions of Section 1, Article 14 of Amendments to the Constitution of the United States, which provides: "No state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws."

Third. The Supreme Court of the State of Montana should have held said tax denied appellant the equal protection of the laws."

The same assignments were made on appeal from the District Court (R. 26, 27).

In the opinion of the Supreme Court of Montana in deciding this case, it said: (R. 27, 28), as follows:

"It is the plaintiff's contention that the statute upon the authority of which the tax was collected is unconstitutional. It is urged that it discriminates between Montana products and those imported into the state; that it is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and also, Section II of Article XII, and Section II of Article XV and Section 26 of Article V of the state Constitution. Section I of the

Fourteenth Amendment, so far as applicable, provides that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor, (shall any state) deny to any person within its jurisdiction the equal protection of the laws. The principal contention is (R. 29) that the law is discriminatory. Upon similar onslaught this Act has been by this Court held to be unconstitutional, (State v Silver Bow Refining Co., 78 Mont. I), and not withstanding the elaborate brief and argument of counsel for the appellant, we see no good reason to change our minds in this regard."

1. The Statute does not violate the Fourteenth Amendment to the Constitution of the United States."

Counsel quotes thus far to show the raising of the Constitutional question and the passing thereon. The decision and its further holding will be referred to in the subsequent argument.

(d)

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States in this action, to-wit:

Ist. As to the application of the provisions of 28 U. S. C. A. Sec. 344. Section 237 Judicial Code heretofore quoted:

Columbia Water Power Co., vs. Columbia Electric St. R. etc., 172 U. S. 475, 488. 489.

Levy vs. San Francisco Sup. Ct. 167 U. S. 175, 177.

Miller vs. Cornwall R. Co., 168 U. S. 131, 134.

Murdock vs. Memphis (20 Wall) 87 U. S. 590, 639, 640.

Scudder vs. New York, 175 U. S. 32, 36.

In Miedricj v. Lauenstein, 232 U. S. 236, 243, this Court said:

> "Where a state Court holds that a federal question is made before it, according to its practice and proceeds to determine it, this Court will regard the question as duly made." (Citations).

In Detroit City Ry. Co. v. Guthard, 114 U. S. 133, 134, the Court said:

> "In Choteau v. Gibson, 111 U. S. 200, it was said: 'From the beginning it has been held, that to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided, or that its decision was necessary to the judgment or decree entered in the case.'"

2nd. The taxation of the use or consumption of gasoline products shipped from sister states, after they have come to rest in the State of Montana, and the interstate commerce status has terminated, is lawful, and does not violate the interstate commerce clause of the Federal Constitution. The 1925 Act could have included the same, and avoided the discrimination complained of:

> Bowman v. Continental Oil Co., 256 U. S. 648, 649.
>
> Texas Company v. Brown, 258 U. S. 475, 476, 480.
>
> Sonneborn Bros. v. Keeling, 262 U. S. 506, 508, 509.

3rd. Failure to remove discrimination against citizens of State, which it was within the province of the Legislature to remove, in favor of products of other states, is in contravention of the provisions of

Section I of the 14th Amendment, and void:

State vs. Silver Bow Refining Co., 78 Mont. 1, 18, 18, saying at page 19:

> "In the first case of State vs. Sunburst Refining Co., above, the Act of 1923 was held unconstitutional because of an unjust discrimination which could have been eliminated," etc.
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> State vs. Sunburst Refining Co., 73 Mont., 68, 82, 80.
>
> Hart Refineries vs. Harmon (case at bar), 81 Mont., 423, 427, 428.
>
> Sonneborn Bros. v. Keeling, 262, U. S., 506, 520.

The foregoing authorities are considered more fully in the argument contained later in this brief, and relevant parts thereof quoted.

We believe the foregoing shows the jurisdiction of this Honorable Court to review this appeal.

(d)

STATEMENT OF THE CASE

This is an appeal from a judgment on the pleadings rendered on the 10th day of February, 1927 by the District Court of Lewis and Clark County in favor of respondent, and against appellant, Hart Refineries, whereby it was ordered, adjudged and decreed that the plaintiff Hart Refineries take nothing by its action, and it was further ordered adjudged and decreed that the plaintiff has no further right, title or interest in or to the sum of $6,071.84 involved in said action, and which was paid by the plaintiff under protest, and it was ordered that the said sum be by the defendant State Treasurer taken from the "Protest License Fund" and deposited to the credit of the funds to which it belongs, as provided in Chapter 186,

Laws of 1925 (R. 21).

The complaint is based upon the unconstitutionality of the Gasoline License Tax Law, as set forth in the R. C. of 1921, as amended by the provisions of Chapter 186 of the Laws of the Nineteenth Legislative session for the year 1925, pages 359, 360, which laws provide for the payment of a Gasoline License Tax of two cents per gallon by every distributor for carrying on business in the state, on every gallon of gasoline and every gallon of distillate refined, manufactured, produced or compounded by a distributor and sold by him within this state; that the plaintiff alleges that it paid under protest the sum of $6,071.84 for the manufacture and sale of 303,592 gallons of gasoline and distillate, refined and sold during the quarter ending on the 30th day of September, 1925, by the Hart Refineries, a corporation organized under the laws of Montana, having a refining plant at Missoula, Montana. Plaintiff's complaint alleges substantially as follows: (R. 1-13)

(1). That at all times since April, 1924, plaintiff was and is a Montana corporation, with its principal place of business at Missoula, Montana, and engaged in manufacturing, refining, producing and compounding gasoline and distillates and selling the same in Montana; that the defendant is the State Treasurer of Montana; that under the provisions of Sections 1, 2, 3 and 5, being Sections 2382, 2383, 2384 and 2392 of Chapter 186 of the laws of the Nineteenth Legislative Assembly for the year 1925, plaintiff was required to pay to said State Treasurer a license tax of two cents for each gallon of gasoline and distillate refined, manufactured, produced and compounded and sold by plaintiff in the State of Montana; that for the

quarter ending September 30, 1925, plaintiff refined and sold in Montana 303,592 gallons, by reason of which plaintiff became liable for the payment of two cents per gallon, amounting to $6,071.84. That plaintiff did not ship nor transport any gasoline or distillate into the State of Montana; that within thirty days after the 30th day of September, 1925, the end of the said quarter period the plaintiff paid to the defendant the sum of said $6,071.84, as State Treasurer of the State of Montana, to be held by him pending the outcome of this action to recover the same as paid under protest that the tax was unlawful, which said sum was so received and accepted by him; that the plaintiff deemed said license tax to be unlawful, and at the time said license was paid, and before the tax became delinquent the plaintiff paid said tax to the defendant as State Treasurer of Montana, under written protest that the same was unlawful, and the defendant received and accepted the same as so paid. (R. 1-3, par. 1-6 of Compl.)

(2). That the complaint further alleges (R. 3, 4, Par. VII, VIII, IX) that during all the time appellant was engaged in the refining, manufacture and selling of gasoline and distillate a large number of corporations organized under the laws of the states of the Union, other than Montana, were engaged in the manufacture, refining, and compounding of gasoline and distillate in such states, and were authorized to do business in Montana under the laws applicable to foreign corporations; that on and at all times after April 1, 1925, said corporations were engaged in the manufacture, refining, compounding and production of gasoline and distillate at places within the United States outside of Montana and during said time they were engaged in the shipment and transporting into

Montana of great quantities of gasoline and distillate which were sold by them outside of the State of Montana, and also great quantities of which were sold within the State of Montana before it was brought to rest in Montana, to corporations, persons and concerns within the State; that said corporations at all times from April 1st to Sept. 30th, 1925, maintained places of business without the State of Montana and also within the State of Montana during which time said respective corporations made sales both without the State of Montana and in the State of Montana, before it arrived and was brought to rest in Montana to persons, corporations, dealers, consumers and users in Missoula County and the territory occupied by plaintiff, in quantities by said various corporations respectively of 400,000 gallons per year and amounting in the aggregate to several million gallons, and during all the period herein mentioned said corporations have been competitors of plaintiff;

(3). That none of said persons, corporations or concerns engaged in refining gasoline and transporting and shipping the same into Montana, and in the sale thereof inside and outside of the State of Montana to their respective customers in the State of Montana *before the same has arrived and been brought to rest in Montana and then resold, was required to pay two cents per gallon as a license tax* or any other tax upon the sale of said gasoline and distillate. (R. 5. Par. XII).

(4). That in addition to said foreign corporations other Montana corporations and individuals were during said time engaged in the selling and distribution of gasoline and distillate to persons residing in Montana. (R. 5. Par. XIII).

(5). That under said law the plaintiff is required to pay two cents per gallon license tax on each gallon sold for the privilege of conducting its business, but said competiting foreign corporations, being competitors of plaintiff, solicit and ship orders to dealers and non-manufacturing distributors and consumers in plaintiff's territory, and *sell said products before they arrive and are brought to rest in the State of Montana, at a price of two cents per gallon less than the market price*, by deducting two cents per gallon which plaintiff is required to pay under said law, but which neither said competitors, dealers, non-manufacturing distributors nor consumers are required to pay on such as is transported from without the state *and is not resold after being brought to rest in Montana.* (R. 6, 7. Par. XVIII). That by reason of this discrimination of two cents per gallon the plaintiff is unable to compete in its territory with said corporations from other states in securing the business of non-manufacturing distributors, dealers, users and consumers.

(6). (R. 7, 8, 9. Par. XIX). That plaintiff's competitors solicit orders and ship to dealers and consumers in Montana, large quantities of gasoline *sold in Montana before it has been brought to rest in Montana, and also large quantities sold in neighboring states before it has been brought to rest in Montana;* that many of said dealers in gasoline in Montana are engaged in other lines of business requiring the use of many delivery trucks and automobiles delivering gasoline to customers, their own service stations located over several counties, running delivery trucks for mercantile businesses, owned by them, besides running touring cars and trucks for their own use

and enjoyment; that if said dealers purchase from plaintiff or a Montana refiner the license tax of two cents per gallon is payable on all of such sales which are required to be reported by plaintiff, when, however, such dealers and consumers purchase their gasoline from said competitors of plaintiff who sell and ship the same from neighboring states, or sell the same before it is brought to rest in Montana, the dealer receives the same delivered to him, in Montana, tax free. That the dealer being absolved from all tax until required to be reported by him within 30 days after the end of the quarter, and then, for such quantity only as has been resold by such dealer, as provided by Sections 2383 and 2384, Chapter 186, Laws 1925, such dealers are entitled to have all that they procure for their own consumption and use tax free.

(7). That neither such dealers, foreign corporations, non-manufacturing distributors or consumers of gasoline are required to pay a tax on such gasoline *as is purchased by them before it is brought to rest in Montana, and are not required to pay a tax on such imported gasoline they sell before the same has arrived in and is brought to rest in Montana;* that by reason thereof not only said foreign corporations and non-manufacturing corporations but the dealers who are also competitors of plaintiff solicit orders and *sell such* gasoline tax free, as has been purchased by such *dealers and resold by them before it comes to rest in Montana*, and thereafter delivered from a foreign state direct in original packages to the consumer, or, upon such re-sales as the dealer may make before it comes to rest in Montana, and thereafter delivered either in broken or unbroken packages, tax free (R.

9). The Montana dealer may purchase gasoline before it comes to rest in Montana, resell it before it comes to rest in Montana, and then after it has come to rest in Montana, deliver it either in broken or unbroken packages, tax free.

(8). That by reason of the premises such dealers and consumers ceased and refused to purchase from Montana manufacturers and from plaintiff, but purchase from plaintiff's competitors, and plaintiff is unable to compete with said competitors, and by reason of the said two cents per gallon which plaintiff has to pay and which his competitors do not have to pay the plaintiff's customers have been lost to him, and plaintiff and Montana manufacturers have been and are unjustly and arbitrarily discriminated against by reason of being a manufacturer and taxpayer in the State of Montana.

(9). That by reason of the premises the plaintiff lost for the quarter ending September 30th, 1925, a profit of $4,000.00 it would otherwise have realized, and will continue to lose $1,500.00 per month, by reason of the discrimination in favor of said foreign corporations. (R. 9, 10).

(10). That by reason of the premises and said discrimination in favor of non-manufacturing distributors and dealers, the plaintiff lost for the quarter ending September 30th, 1925, a profit of $4,000.00 which it otherwise would have realized, and will continue to lose $1,500.00 per month. (R. 10. Par. XXI).

(11). That the imposition of said two-cent license tax on plaintiff is the sole cause of the inability of plaintiff to sell gasoline and distillate to persons within Montana, at the prices which have been paid by such persons to the corporations and individuals

hereinbefore mentioned, and but for said tax plaintiff would be able to meet such prices and to sell substantially all of the gasoline which it manufactured, to persons within the State of Montana. (R. 10. Par. XXII).

(12). That no part of said license tax prescribed was for police regulation or supervision of oil refineries but said license tax, when paid, is used for revenue purposes only. (R. 11. Par. XXIII).

(13). That by reason of the premises the plaintiff is denied the equal protection of the laws as against its competitors established in other states, in the State of Montana, and in plaintiff's territory in Missoula, and Western Montana, and is unable to compete under said law permitting such unreasonable, unlawful and arbitrary discrimination, and said gasoline license tax law is in violation and contravention of Section 1 of Article XIV of Amendments to the Constitution of the United States, and is void. (R. 11. Par. XXIV).

(14). That by reason of the premises said gasoline license tax law permitted foreign corporations to exercise and enjoy within the State of Montana, greater rights, privileges and immunities, under the laws of the State of Montana, than those enjoyed by plaintiff, a domestic corporation, and other manufacturing distributor corporations of similar character organized under the laws of the State of Montana, which is in violation and contravention of Section Eleven (11) of Article Fifteen (XV) of the Constitution of the State of Montana. (R. 11. Par. XXV).

(15). That the imposition of said license tax constitutes an unjust discrimination against appellant, a domestic corporation, and in favor of foreign and

other domestic corporations and individuals; that such tax is not uniform in its operation upon the same class of subjects, to-wit: upon gasoline and distillate sold by domestic corporations, being manufacturing distributors, within the territorial authority of the State of Montana, which levies the tax, and such as is sold in other states to non-manufacturing distributors, dealers and consumers within Montana, before it has arrived and been brought to rest in Montana, and such as is sold in Montana, before it has arrived and been brought to rest in Montana, by foreign corporations, non-manufacturing distributors, domestic corporations, dealers and individuals doing business in the State of Montana; that by reason thereof the provisions of Sections 2382, and 2383 of Chapter 186 of Laws of 1925 are in violation and contravention of the provisions of Section Eleven of Article XII, of the Constitution of the State of Montana. (R. 11-13. Par. XXV).

(16). That by reason of the premises said law is in violation and contravention of Sections One (1) and Seven (7) of Article Twelve (12) of the Constitution of the State of Montana.

(17). That by reason of the premises there is due and owing plaintiff the sum of $6,071.84 for which plaintiff demands judgment. (Tr. p. 18).

(18). The answer of the defendant admits the allegations of paragraphs I to XI inclusive of plaintiff's second amended complaint, except the defendant alledges insufficient knowledge as to whether the corporations mentioned in Paragraph VII or any other corporation or individuals with places of business out of the state transported into the state gasoline, or made sales within their respective states outside of

Montana or within Montana, before it arrived in and was brought to rest within Montana for delivery to persons, corporations, dealers and consumers in Montana in quantities alleged in paragraph IX, or in any amount, and as to whether said parties were competitors of plaintiff, and defendant denies that some of said corporations enumerated in Par. VII, were authorized to do business in Montana. (R. 14, 18).

(19). The answer admits the allegations of paragraphs XIII, XIV, XVI and XVII, and alleges insufficient knowledge as to Par. XV. Admits that the State of Montana does not regulate the manufacturing, refining or compounding of gasoline or distillate, or the sale or distribution thereof within the State of Montana.

(20). The answer denies the other allegations of plaintiff's complaint.

(21). The plaintiff demurred to the defendant's answer on the ground that it did not state facts sufficient to constitute a defense to plaintiff's second amended complaint, which demurrer was overruled. (R. 19).

(22). The plaintiff replied denying all affirmative matter set forth in defendant's answer as amended. (R. 19).

(23). The defendant moved for judgment on the pleadings. (R. 20). This admitted the truth of matters of fact pleaded.

(24). The motion for judgment on the pleadings was sustained and judgment entered for the defendant and against the plaintiff. (R. 20).

(25). The plaintiff filed its notice of appeal from the judgment. (R. 25).

(26). Petition for Appeal, Assignments of Error, and Prayer for Reversal, presented and filed April 27, 1928. (R. 32, 33).

(27). Order allowing Appeal filed April 27, 1928, by the Chief Justice of the Supreme Court of Montana, fixing bond in sum of $1,000,00, and directing the record be sent to the Supreme Court of the United States, within sixty days.

(28). Citation, issued in usual form, showing service on L. A. Foot and others. (R. 34).

(29). Bond on Appeal for $1,000.00 approved and filed, May 2, 1928. (34).

(30). Praecipe for Record and service thereof filed May 16, 1928. (R. 35, 36).

(31). Clerk's Certificate of Transcript. (R. 36).

(32). Statement of Points to be Relied Upon Designation of the parts of the Record to be printed, and service of same, filed June 19, 1928.

(33). Endorse on cover: File No. 33,519, No. 210. Filed June 16, 1928.

(e)

All of the assigned errors are hereby specified as intended to be urged by counsel for appellant, to-wit:

As set forth (R. 32, 33), and hereinbefore set forth at page — hereof. Said Assignments of Error raise the sole question of appellant's claim that the law involved is in violation of Section I, of the 14th Amendment to the Constitution of the United States, providing that no state shall deny to any person within its jurisdiction the equal protection of the laws.

SUMMARY PRECEDING ARGUMENT

It is appellant's contention that the Montana License Tax Law of 1925 discriminates against the Montana refiners. This discrimination could have been prevented, by having included in said law, taxation of gasoline shipped from sister states, after its interstate commerce status was terminated and it was at rest in Montana, by applying to such as was used or consumed. Said law limited the gasoline tax on such as was shipped from sister states, to such as was sold after it had been brought to rest in Montana. It eliminated all shipped for consumption or use, or consumed or used after it had reached a place of rest in Montana and its interstate commerce status terminated. That the Legislature of Montana had authority to have lawfully included in said law, the taxation of such gasoline as was shipped from sister states and used or consumed, which would have avoided such discrimination. That such a law would not be any burden upon, or regulation of interstate commerce. That the Supreme Court of Montana erred in holding that such law avoiding said discrimination would be a burden on interstate commerce.

That the holding of said law as invalid would entail little loss to Montana, as only a few thousand dollars, perhaps less than fifty thousand dollars, remains unpaid under said law of 1925. In 1927 the Legislature of Montana passed a gasoline license tax law, removing said discrimination, just as suggested above, by extending said tax to the consumption and use. It stands independent of the 1925 Act, and over two million dollars have been paid under it. No objection has been raised to it as Montana manufactured products are not discriminated against in favor of products of

sister states. The declaring of the 1925 Act invalid would not affect the collection of gasoline license taxes as they have all been paid under the 1927 Act, since January first, 1927.

The appellant, as a Montana refiner, under the 1925 gasoline license tax law, was required to pay two cents a gallon on all gasoline manufactured and sold, but said law did not require any tax on gasoline shipped from other states to pay said tax, nor any tax on gasoline which was not sold after it was brought to rest in Montana. The law did not require said tax, nor any tax, on such gasoline as was shipped into the state for consumption or use, or which was used and not resold. After gasoline shipped from sister states had completed its interstate commerce status, and had come to rest in Montana, it could have lawfully been included in such license tax. To do so would not be any interference with, or burden upon interstate commerce. The Supreme Court of Montana held in this case (81 Mont. 426), as follows:

> "As to the contention that products may be imported into the state for consumption without the payment of a tax, and thus users are induced to deal with outside concerns when their needs are sufficiently great to warrant buying in bulk and thus withdraw their patronage from dealers within the state, the situation is one which cannot be remedied by state legislation. By Sections 9 and 10, Article I, of the Constitution of the United States, the regulation of interstate commerce is granted exclusively to Congress; Congress has long since acted on the subject, and 'the states have no power by taxation or otherwise to retard, impede, burden, or in any manner control, the

> operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government.' "

Again, it was held by the Supreme Court of Montana,

> State v. Silver Bow Refining Co., 78 Mont. 1, 19:
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> "In the first case of State vs. Sunburst, above, (73 Mont. 68), the Act of 1923 was held unconstitutional because of an unjust discrimination which could have been eliminated under the decision in Sonneborn Bros. v. Cureton, 262 U. S. 506, 67 L. Ed. 1095, holding that 'a tax on the sale of oil imported after it had come to rest in the state would be neither a regulation nor a burden of the interstate commerce of which the oil had been the subject.' "

That said law could have been extended to include such gasoline as was shipped into the state for consumption or use, or was consumed or used, was decided by this Court in the cases of Bowman v. Continental Oil Co., 256 U. S. 648, 649. Texas Company v. Brown 258 U. S. 475, 476, 480, 481, 482. Sonneborn Bros. v. Keeling, 262 U. S. 506, 508, 509, which cases are hereinafter cited in the argument.

The allegations of appellant's complaint raise these issues.

ARGUMENT

The effect of a decision of this Court validating the principle involved in this controversy would, under such law, entirely destroy the refining industry of the State of Montana, and have a most far-reaching effect on the oil industry of the State requiring freight rates shipping the oil from the State for refining, raising the price and in the end defeating the very object of the law, which is to raise revenue.

It may be noted here that to hold said law invalid would entail no appreciable loss to the State of Montana, as only a few thousand dollars above what is involved in this action remains unpaid. The heavy penalty feature of the law, of ten per cent and one per cent per month, (Mont. 1925, Sec. 2384), for nonpayment leaving few who had the courage to refuse payment. Then the taking effect of the law of Jan. 1, 1927, (Mont. Laws 1927 P. 30), removed the discrimination, in a companion measure, running along with this law, which did just what appellant claims should have been done by the law in controversy, extended it to require the tax to be paid on all gasoline used in Montana, after it had reached a state of rest in Montana, and its interstate status terminated. Over two million dollars have been collected under this 1927 Act. The Act involved being declared invalid, would not effect the law of 1927, under which all taxes have been paid since Jan. 1, 1927, which reaches all imported and consumed or used.

The effect of a decision of this Court foreclosing any attack upon the 1925 Act, might bring about a repeal of the 1927 Act, and leave the discrimination, which was cured by the 1927 Act, still stand, with all its iniquities.

Said Act of 1927, (Mont. 1927, Chapter 19, at Page 30), eliminating said discrimination is, in part, as follows:

> "(6). The word 'handle' means to produce, refine, manufacture, compound, or import gasoline, or to purchase gasoline for one's own use, upon which the license tax herein imposed has not been paid."
>
> "(7). The word 'Dealer' means and includes any person who engages in the business

in the State of Montana of producing, refining, manufacturing or compounding or of purchasing in this State, or of importing into this State, gasoline for sale or use in this State. Such gasoline, for the purpose of this Act shall be deemed to be 'handled' by the dealer."

"Section 2. Every dealer shall pay to the State Treasurer A LICENSE TAX for engaging in and carrying on such business in this State in an amount equal to three cents for each gallon of gasoline handled by him in this State while engaging in such business as heretofore defined."

That such a law as the 1927 Law could be lawfully passed by the Legislature, was alleged in appellant's answer, in the following language, which was admitted by the motion for judgment on the pleadings, to-wit: (R. 17).

"That in the passage of said gasoline license tax law upon which plaintiff relies for recovery in this action, it was within the province of the Legislative Assembly of the State of Montana, which passed said law, to have so framed said law that every advantage accruing under said law, would have remained under said law as a gasoline license tax law, whereby said law would have been more general in its application, and extended to cover the inequalities in this answer mentioned, causing said tax to apply to the parties herein mentioned in whose favor said law discriminated, making said law and said discriminations unnecessary and arbitrary, as against the defendant and Montana manufacturing distributors, and said Legislative Assembly could have lawfully passed a commodity tax or a user's or consumer's tax, to apply after shipments to and into the State of Montana, were within the jurisdiction of the State of Montana, for purposes of taxation, and

thereby have created a more general tax which would have met all of the benefits of the 1925 Act, and have extended its application to have avoided the unnecessary, arbitrary and unjust discriminations herein mentioned."

The 1927 Act increased the tax to three cents a gallon, and in increase above that is probable in the future. The higher the tax naturally the greater the discrimination.

When gasoline is shipped into Montana for use, or which is used in Montana, there comes a time between the shipment and use, when it has terminated its interstate commerce status. At this point, it is within state jurisdiction and authority to tax. To do so is no interference with interstate commerce. Upon this theory the gasoline tax law of 1927, was based and very properly so.

Appellant's contention has been, not that the law was invalid because it did not tax such gasoline as was in interstate commerce but, on the contrary, that the law should have avoided discrimination against the Montana refiner, by extending the tax to such gasoline as was consumed or used after it had come to rest in Montana and its status in interstate commerce ended.

Under said Act the gasoline license tax law, did not extend to any gasoline or distillate not sold after its arrival in the state, thereby permitting all gasoline shipped from sister states to consumers to be used, tax free, while if such consumer bought a Montana product, he would have to pay the tax.

The provisions of the Montana Gasoline License Tax Law of 1925 necessary to show the points at issue are quoted as follows:

"Section 2382. Every distributor shall pay * * * to the State Treasurer a license tax for engaging in and carrying on such business in this State, in an amount equal to two cents for each gallon of gasoline and two cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold by him in this state, or shipped, transported or imported by such distributor into, and distributed and *sold* by him within this state; *after it had arrived in and was brought to rest within this State*, whether sold in original packages or broken packages."

"Section 2383. Every dealer shall * * * when engaged in such * * * business in this state, pay the State Treasurer * * * a license tax for engaging in such business in this State equal to two cents for each gallon of gasoline and two cents for each gallon of distillate *sold* or distributed by such dealer in this State during such year, provided, however, that no gasoline or distillate sold by said dealer, which was purchased from a producer who had paid the tax thereon, shall be included or considered in determining the amount of such license tax to be paid by such dealer, *but only* such gasoline and distillate as was shipped, transported, or imported into this State and purchased by such dealer before it had arrived and was brought to rest within this State *and then resold* by such dealer, whether in original packages or in broken packages, shall be included or considered for the purpose of computing the amount of such license tax."

Sec. 2381 of Rev. Codes of 1921, is as follows:

"Section 2381. 'Person,' 'distributor' and 'dealer' defined. As used in this act: The term 'person' means and includes every individual, firm, association, joint-stock company, syndicate, and corporation.

> The term 'distributor' means and includes every person who engages in the business in the State of refining, manufacturing, producing, or compounding gasoline or distillate, and selling the same in this State; and also every person who engages in the business in this State of shipping, transporting or importing any gasoline or distillate into, and making original sales of the same, in this State.
>
> The term 'dealer' means and includes every person, other than a distributor, who engages in the business in this State, of distributing or selling gasoline or distillate within the State."

This law requires the *Montana refiner* to pay two cents per gallon on all gasoline and distillate he manufactures and sells.

It does not require such tax on any gasoline as is *imported by refiners located in sister states*, which is not sold in Montana.

It does not require such tax upon such as is shipped by *distributors or dealers* in Montana, from sister states, until it is *sold*, after it is brought to rest in Montana.

Gasoline imported to consumers, from sister states could have been included in said tax, after it had reached a state of rest in Montana, and completed its interstate commerce status, but was not.

Gasoline imported to dealers, from sister states, used for their own consumption, could have been included in said tax, after it had reached a state of rest in Montana, and its interstate status was terminated, but it was not.

The tax permitted competitors of appellant to ship gasoline from sister states and, after it had come to rest in Montana, use it tax free, which could have

been lawfully brought within the tax, but was not.

Said law permitted dealers to purchase gasoline in sister states, ship it to Montana, and after its status in interstate commerce had ceased, and the gasoline was in their own storage tanks, use such as they desired for their own consumption, tax free.

The effect of such discrimination was such that the Montana refiner who paid a tax of two cents per gallon, could not compete against sales of gasoline imported from a sister state which was not required to pay two cents a gallon, nor any tax, if sold to consumers, importing distributors and dealers in the State of Montana.

The Montana refining and manufacturing industry could not survive under said discrimination.

The allegations of appellant's answer brought it within the decision of this Court in the late case of Bowman v. Continental Oil Co., 256 U. S., 648, 649, as follows:

> "With the excise tax as imposed upon the *use* of gasoline by plaintiff at its distributing stations, in the operation of its automobile tank wagons and otherwise, we have no difficulty. Manifestly, gasoline thus used has passed beyond interstate commerce, and the tax can be imposed upon its use, as well as upon the sale of the same commodity in domestic trade, without infringing plaintiff's commercial rights under the Federal Constitution. * * * The tax imposed by the act under consideration upon the "sale or use of gasoline sold or used in this state," is not property taxation, but in effect, as in name, an excise tax. We see no reason to doubt the power of the state to select this commodity, as distinguished from others, in order to impose an excise tax upon its sale and use; and since the tax operates impartially

upon all, and with territorial uniformity throughout the state, we deem it "equal and uniform upon subjects of taxation of the same class, within the meaning of Section 1 of Article 8."

Appellant's answer raised the same question, to-wit: (R. 7, 8, Par. XIX.)

That the competitors of appellant:

"Solicit orders for and ship to dealers and consumers in Montana, large quantities of gasoline and distillate sold in Montana before it has arrived and is brought to rest in Montana, and also large quantities of gasoline and distillate sold in said neighboring states before it has been brought to rest in Montana; that besides being such dealers in the sale and delivery of said gasoline and distillate, many of the said dealers operate other lines of business requiring the use of many delivery trucks and automobiles in delivering gasoline to their customers, their own service stations located over several counties, running delivery trucks for mercantile businesses owned by them, besides using touring cars and trucks for their own use and enjoyment," etc.

The complaint also further alleges: (R. 7, Par. XVIII.)

That by reason of this discrimination of two cents per gallon, plaintiff is unable to compete with said corporations from other states in the territory of plaintiff in securing the business of non-manufacturing distributors, dealers, users and consumers in plaintiff's territory in Montana. That among the important consumers for whose business plaintiff is unable to compete in its territory by reason of their exemption from said tax when they buy gasoline which is shipped from out of the state, but purchased

before it has been brought to rest in this State, are the Chicago, Milwaukee and St. Paul Railway Company and the Northern Pacific Railway Company, who, prior to the enactment of said law, were important and profitable customers of plaintiff, but whose business by reason of the premises has been lost to plaintiff.

Again, in the later case of

Texas Company v. Brown, 258 U. S. 475-476,

the Court said:

> "Plaintiff makes the broad contention that inspection charges, amounting in effect to taxation, cannot be imposed even upon that part of its products which has come to rest within the state, or is disposed of in domestic trade, in view of the fact that all of it has come from other states. But American Steel & Wire Co. v. Speed, 192 U. S. 500, 520, 48 L. Ed. 538, 546, 24 Sup. Ct. Rep. 365, settles the principle that goods brought into a state, not from a foreign country, but from another state, having reached their destination, and being held in storage awaiting sale and distribution, enjoying the protection which the laws of the state afford, may, without violation of the commerce clause, be subjected to non-discriminatory state taxation, even though still contained in original packages. This decision is in line with the previous cases of Woodruff v. Parham, 8 Wall. 123, 140, 19 L. Ed. 382, 387, and Brown v. Houston, 114 U. S. 622, 632, 634, 20 L. Ed. 257, 260, 261, 5 Sup. Ct. Rep. 1091, and it was pointed out that their authority was not overruled by Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, or other cases of like character."

In the same case, at page 480, the Court said:

"That the legislature intended the effect of the tax to fall upon the ultimate consumer is evident, not only from the obviously inevitable result of requiring its payment, ordinarily, by the first domestic seller, but from the specific provisions of the amendatory Act of 1913, that the 1912 Act "shall apply not only to gasolenes, benzins, and napthas sold or offered for sale in the State of Georgia, but likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia, for consumption or use. Where such commodities or any of them may be purchased within the state, or without the state, and brought into the state, by any person, firm, or corporation, not for the purpose of selling or offering the same for sale, but for the purpose or use or consumption by the purchaser in manufacturing or other lawful uses, either as a fuel or otherwise, the inspections herein prescribed shall be made, and the fees above fixed shall be paid therefor."

In the same case, at Pages 481 and 482, the Court said:

"The peculiar qualities of illuminating oils and gasoline seem to us a sufficient warrant for putting them in a class by themselves for excise taxation upon their sale or use. So we held in Bowman v. Continental Oil Co., 256 U. S. 642, 65 L. Ed. 1139, with respect to an excise tax upon the sale or use of gasoline, under a provision of the Constitution of New Mexico, not differing materially."

In Sonneborn Bros. v. Keeling, 262 U. S. 506, 508, 509,

The Court said:

"Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of

rest in the warehouse of the appellants, and had become a part of their stock, with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

In Foster-Creighton Company v. Graham, (285 S. W. 570) 47 A. L. R. 971

commenting upon the foregoing question and decisions the Court said: (Page 975)

"We think the effect of the amendatory Act of 1925 when properly interpreted, is to reach gasoline that is stored and thereafter withdrawn and used without being sold by any person, etc."

"Under the act of 1923, a large consumer, desiring to escape the tax levied by the Act, could do so by buying his gasoline in quantities, say in tank lots, storing it, thereafter withdrawing it, and using it as needed. In such case there would be no intrastate sale or distribution within the meaning of said act, and such consumer would not, therefore, be subject to the tax."

"It was manifestly the purpose of the legislature in passing the amendatory act, to cut off this avenue through which large consumers might evade the tax."

"We think the act, when properly interpreted not only applies to distributors and dealers in gasoline, but applies to consumers who purchase gasoline in interstate commerce and store it, and thereafter distribute the same, or allow

the same to be withdrawn from storage, whether such withdrawal be for sale or other use. It therefore follows that complainant and all other persons, etc., in like situations, come within the provisions of the act."

Page 977:

"The validity of a tax on the use and consumption of gasoline has been recognized and sustained by the Supreme Court of the United States in the two recent cases of Bowman v. Continental Oil Co., 256 U. S. 642, 65 L. Ed. 1139, and Texas Co. v. Brown, 258 U. S. 466, 66 L. Ed. 721.

The decisions of the Supreme Court of Montana as set forth in the case of State v. Sunburst Refining Co., 73 Mont. 68, and State v. Sunburst Refining Co., 76 Mont. 472, sustain appellant's contention in these cases. In those cases the Court concedes, that if there was a discrimination affecting the Montana refiner, which could have been eliminated by said act, and was not, it violates the provisions of the 14th Amendment to the Constitution of the United States.

The Montana Court erred in holding that such discrimination could not be removed.

The Court said in

State v. Sunburst, 73 Mont. 68, 82:

"It may be accepted, then, as settled beyond all further controversy that gasoline or distillate, brought into this state from a sister state and stored in original packages, afterward to be sold in this state, is no longer an article in interstate commerce, but is merely property in this state, and as such does not enjoy any greater privilege or immunity than gasoline or distillate manufactured in this state. In other words, such gasoline or distillate, though brought here from another state and held in

> the original packages for sale in this state, is subject to a property tax, or may be made the basis of an occupation tax, the same as gasoline or distillates manufactured in this state."

Again, the Court said in said decision at Page 80 as follows:

> "What, then, is the basis of the classification made by this statute etc. * * * The only ground upon which the attorney general seeks to justify the classification is that the statute discriminates only between a business which is a lawful subject of license tax, and one which is not, and this contention has its foundation in the assumption that a license tax imposed upon any one who sells in the original packages gasoline or distillate shipped into this state from another state, would constitute a burden upon or regulation of interstate commerce. If this assumption were justified, the argument in support of it would be unanswerable, but since the assumption is altogether unwarranted, the argument falls of its own weight."

It is the contention of appellant that the Court erred in not holding the same decision in the case at bar by holding that said gasoline license tax law of 1925 could have been extended, to avoid such discrimination against the Montana refiner, which was in fact done by the legislature in the year 1927, which was made to and did apply to all gasoline sold or distributed from and after December 31, 1926. That only by reason of said supplemental law was the appellant and Montana refiner enabled to continue in business.

The Supreme Court of the State of Montana, in passing on said 1925 act said, in

> Hart Refineries v. Harmon, 81 Mont. 423, 427:

"The principal contention is that the law is discriminatory. Upon similar onslaught this Act has been by this Court held to be constitutional (State v. Silver Bow Refining Co., 78 Mont. 1, 252 Pac. 301), and notwithstanding the elaborate brief and argument of learned counsel for the appellant, we see no good reason to change our views in this regard.

1. The statute is not violative of the Fourteenth Amendment to the Constitution of the United States. (State v. Silver Bow Refining Co., supra) That which would invalidate the law because of unjust discrimination has been thoroughly considered in the case last cited, and in the two cases entitled State v. Sunburst Refining Co., 73 Mont. 68, 235 Pac. 428; Id., 76 Mont. 472, 47 A. L. R. 969, 248 Pac. 186.

The law is now settled. As was well said by Mr. Justice Matthews, speaking for this court in the Silver Bow Refining Co. case: 'As to the contention that products may be imported into the state for consumption without the payment of a tax, and thus users are induced to deal with outside concerns when their needs are sufficiently great to warrant buying in bulk and thus withdraw their patronage from dealers within the state, the situation is one which cannot be remedied by state legislation. By sections 9 and 10, Article I, of the Constitution of the United States, the regulation of interstate commerce is granted exclusively to the Congress; Congress has long since acted on the subject, and "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government".'

* * * * *

"Under the authority of the case of Sonne-

> born Bros. v. Cureton, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643: 'It may be accepted * * * as settled beyond all further controversy that gasoline or distillate brought into this state from a sister state and stored in the original packages, afterward to be sold in this state, is no longer an article in interstate commerce, but is merely property in this state, and as such does not enjoy any greater privilege or immunity than gasoline or distillate manufactured in this state. In other words, such gasoline or distillate, though brought here from another state and held in the original packages for sale in this state, is subject to a property tax, or may be made the basis of an occupation tax, the same as gasoline or distillate manufactured in this state.' (State v. Sunburst Refining Co., 73 Mont. 68, 235 Pac. 428.

The foregoing holding is certainly contradictory, holding that if the law had extended to tax the use of gasoline, it *would* have been interstate commerce and that it *would* not have been in interstate commerce.

All seem to agree that the tax could have been extended to gasoline used and eliminate the discrimination, and the 1927 Act actually did so, and yet the decision of the case at bar holds that it could not be done, and in the former cases that it could have been done, and that if it could have been done, but was not, that it violated Section One of the 14th Amendment.

In State v. Sunburst Refining Co., 73 Mont. 68, 82, the Court said:

> "It may be accepted then, as settled beyond all further controversy that gasoline or distillate brought into this state from a sister state and stored in the original packages, afterward to be sold in this state, is no longer an article in interstate commerce, but is merely property

> in this state, and as such does not enjoy any greater privilege or immunity than gasoline or distillate manufactured in this state. In other words, such gasoline or distillate, though brought here from another state and held in the original packages for sale in this state, is subject to a porperty tax, or may be made the basis of an occupation tax, the same as gasoline or distillate manufactured in this state."

The Court said, in

> State v. Silver Bow Refining Co., 78 Mont. 1, 19:
>
> "In the first case of State v. Sunburst Refining Co., above, the Act of 1923 was held unconstitutional because of an unjust discrimination which could have been eliminated under the decision in Sonneborn Bros. v. Cureton, 262 U. S. 506, 67 L. Ed. 1095, holding that a tax on the sale of oil imported after it had come to rest in the state would be 'neither a regulation nor a burden of the interstate commerce of which the oil had been the subject."

Under the 1925 law, transportation companies having passenger stages and freight trucks, running in numerous directions out of Missoula and other towns of the state, could purchase the foreign product, store it in their tanks after the transportation was entirely over, and use the same, tax free. Thereby parties whose sole business was the use of the highways were not required to pay a tax, and the market is lost to the Montana refiner, and the State of Montana loses the benefit of a tax. Also parties can contract to do trucking, making all deliveries for numerous mercantile establishments, and can thus secure their gasoline without tax. Numerous instances occur of various characters to the same effect.

The following further allegations of appellant's

complaint appear and are admitted by the motion for judgment on the pleadings, viz:

That said discriminations in favor of foreign corporations and foreign refiners for the quarter for which said tax was paid, ending September 30th, 1925, by reason of shipments from sister states, caused appellant a loss of $4,000.00 and by said discriminations in favor of non-manufacturing distributors and dealers during said period, caused appellant a loss of $4,000.00. R. 10. Par. XXI).

That the imposition of said tax of two cents per gallon was the sole cause of the inability of appellant to sell said gasoline causing appellant's loss. (R. 10. Par. XXII).

That the said gasoline tax was imposed by the State of Montana, solely for revenue purposes, and none was used for police regulation or supervision of oil refineries or the sale and distribution of gasoline and distillate. R. II. Par. XXIII).

That by reason of the premises appellant was denied the equal protection of the laws of Montana.) R. II. Par. XXIV).

Illustrations have been set forth showing the actual discrimination against the Montana refiner in the working out of the law, and many others logically occur. As said by the Supreme Court of Montana, State vs. Sunburst Refining Co., 73 Mont. 83:

> "The statute very clearly authorized such successive taxes, and the test is, not what has been done under it, but what may be done under it. (State ex rel. Holliday v. O'Leary, 43 Mont. 157)."

In conclusion it is most earnestly contended by appellant that the 1925 gasoline license tax law was dis-

criminative against Montana industries in favor of the products of refiners of gasoline in sister states, transported to Montana; that the discrimination could lawfully have been avoided, but was not; that it was of such a character that the Montana refiner was unable to compete and that the refining industry of Montana could not survive under it. That it was arbitrarily and unjustly discriminative and void.

Wherefore appellant respectfully submits that said judgment should be reversed, and the judgment of this Court, require that the sum of money involved in this action, to-wit: $6,081.74, paid under protest by appellant, be ordered restored to the "Protest License Fund," referred to in the judgment, (R. 21), and that judgment be had and given in favor of appellant for the said sum involved, and for costs.

Respectfully submitted,

JOHN E. PATTERSON,

Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1928.

Hart Refineries, Appellant, vs. W. E. Harmon, as Treasurer of the State of Montana.	Appeal from the Supreme Court of the State of Montana.

[February 18, 1929.]

Mr. Justice Sutherland delivered the opinion of the Court.

A Montana statute (§§ 2382 and 2383 Revised Codes 1921, as amended by c. 186, Laws 1925) levies an excise tax upon distributors and dealers engaged within the state in the business of refining, manufacturing, producing, or compounding gasoline or distillate and selling the same in the state, and also upon those engaged within the state in the business of shipping, transporting, or importing any gasoline or distillate into the state and selling the same in the state after it has been brought to rest therein. The basis of the tax is the *sale* of gasoline or distillate, and the statute, in that respect, makes no discrimination, except that it properly excludes from the operation of the tax the imported commodity while it continues subject to the commerce clause of the Constitution. *Raley & Bros.* v. *Richardson*, 264 U. S. 157, 159. Thus far the validity of the statute is conceded.

But the contention is that the statute discriminates against the Montana refiner because it is not extended to include gasoline or distillate shipped from other states and consumed or used after it has come to rest in Montana and its status in interstate commerce has ended. Upon this ground the statute is challenged as constituting a denial of the equal protection of the laws, in contravention of the Fourteenth Amendment to the federal Constitution. The Supreme Court of Montana upheld the statute as valid, 81 Mont. 423, following its earlier decision in *State* v. *Silver Bow Refining Co.*, 78 Mont. 1, 19, where it was held that, while a tax upon the sale of imported oil after it had come to rest in the state or upon such oil as property would be valid, any attempt to lay a tax upon products shipped into the state for consumption only would be a burden upon interstate commerce.

This holding, as it was applied to the contention in the present case, seems to have been the result of a too literal reading of *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, which was cited as authority. In that case, this Court, upon a full review of the earlier cases, held that when a commodity shipped from another state had come to rest as a part of the stock in trade of the dealer, the interstate transportation was at an end, and whether in the original packages or not a state tax upon the commodity, either as property or upon its sale in the state, if laid on the commodity generally without regard to its origin, would not constitute a burden upon or be a regulation of interstate commerce of which the commodity had been the subject. But there is nothing in the opinion to suggest that the taxing power of the state is limited to the two kinds of taxes mentioned. Interstate transportation having ended, the taxing power of the state in respect of the commodity which was the subject of such transportation, may, so far as the commerce clause of the federal Constitution is concerned, be exerted in any way which the state's constitution and laws permit, provided, of course, it does not discriminate against the commodity because of its origin in another state. That under such circumstances a tax may be imposed upon the use as well as upon the sale of the commodity in domestic trade, without coming into conflict with the commerce clause, was specifically determined in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 648.

But because the state legislature could have laid a tax upon the use of the commodity as well as upon its sale, it by no means follows that a failure to do so constituted a discrimination forbidden by the equal protection clause of the Fourteenth Amendment. That clause does not prohibit classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided that the classification rest upon a substantial difference so that all persons similarly circumstanced will be treated alike. Statutes which tax one class of property while exempting another class necessarily result in imposing a greater burden upon the property taxed than would be the case if the omitted property were included. But such statutes do not create an inequality in the constitutional sense. Nor is the imposition of an excise tax upon one occupation or one activity from which other and different occupations or activities are exempt, a denial of equal protection. It is enough if all in the same class are in-

cluded and treated alike. These propositions are so firmly established by repeated decisions of this Court that further discussion is unnecessary. *Bell's Gap R'd Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606; *Keeney* v. *New York*, 222 U. S. 525, 536; *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, 329-331; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 463; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 92; *Pacific Express Company* v. *Seibert*, 142 U. S. 339, 350; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 572; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 179.

The difference between an excise tax based on sales and one based on use of property is obvious and substantial. If the state sees fit to tax one and not the other, there is nothing in the federal Constitution to prevent; and it is not for this Court to question the wisdom or expediency of the action taken or to overturn the tax upon the ground that to include both would have resulted in a more equitable distribution of the burdens of taxation.

Judgment affirmed.

No. 490.—October Term, 1928.

Hart Refineries, Appellant, vs. The State of Montana. } Appeal from the Supreme Court of the State of Montana.

[February 18, 1929.]

Per curiam: Upon consideration of the jurisdictional statement heretofore filed, and following the view expressed by the Supreme Court of Montana, we entered an order dismissing the appeal in this case as frivolous upon the authority of *Raley & Bros.* v. *Richardson*, 264 U. S. 157, 159. — U. S. —. Upon the authority of *Hart Refineries* v. *Harmon*, *ante*, p. —, decided this day, presenting precisely the same question, that order is now vacated and the judgment below is

Affirmed.

PETITION FOR REHEARING OF APPELLANT.

Comes now the appellant, Hart Refineries, and presents this, its petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

That this Honorable Court sustained the contention of appellant in holding that the commerce clause of the Federal Constitution did not prevent a state from taxing the use as well as the sale of gasoline, as long as it did not discriminate against a commodity because of its origin in another state.

One question escaped the attention of the Court concerning the application of the 1925 Act, itself, showing the discrimination in the tax among those within the same classification, and not in conflict with the finding of the Court.

It appears that the Court took into consideration on the question of classification, only the question as it related to the extension of the 1925 act to tax the use of gasoline, and did not consider the alleged inequalities of the 1925 Act, itself, in its capacity as a sales tax, with regard to the classes discriminated against.

The Act of 1925, sec. 2382, provides that the Montana refiner shall pay a tax of two cents a gallon on what he refines and sells, and that the distributor shall pay a tax of two cents per gallon on what he ships, transports or imports into the state and which is "SOLD BY HIM WITHIN THIS STATE, AFTER IT HAD ARRIVED IN AND WAS BROUGHT TO REST WITHIN THIS STATE."

The effect of this tax is to exempt all gasoline from the tax, which is shipped to Montana for sale, or in consequence of a sale, after it has arrived in Montana and its interstate commerce status is ended, but before the same

is resold after coming to rest in Montana. Thus the Montana distributor who sells imported gasoline, may after it has arrived in the state for sale, sell the same before it is brought to rest, tax free, then bring it to rest and deliver the same. Its effect is illustrated later.

That gasoline imported into the state from a sister state for sale, or in consequence of a sale, after its arrival in the state, even before it has been brought to rest in the state, is taxable the same as other property within the state, is well established in this Court.

In Wagner v Covington 251 U. S. 102, 103, the Court said:—

> "The distinction between state regulation of peddlers and attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce has always been recognized. In Robbins v Shelby taxing District 120 U. S. 489; 30 L. Ed. 694, Mr. Justice Bradley, who spoke for the Court said 'When goods are sent from one state to another for sale, or in consequence of a sale, they become part of the general property, and amenable to its laws; providing that no discrimination be made against them as goods from another state, but only taxed in the usual way other goods are.' Brown v Houston 114 U. S. 622; 29 L. Ed. 257; Howe Machine Co. v. Gage 100 U. S. 676; 25 L. Ed. 754.
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> "We have, then, a state tax upon an itinerant vendor of goods as carried on within the state—a tax applicable alike to all such dealers, irrespective of where the goods are manufactured, and without discrimination against goods manufactured in other states. It is settled by repeated decisions of this Court that a license regulation or tax of this nature, imposed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon

interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the state, and does not conflict with the "commerce" clause. Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 282, 287. Howe v Gage 100 U. S. 676, 25 L. Ed. 754, Emmert v Missouri 156 U. S. 296; 39 L. Ed. 430; Baccus v Louisiana 232 U. S. 334; 58 L. Ed. 627."

Brown v Houston, 114 U. S. 634, 635.

Askern v Continental Oil Co. 252 U. S. 449, 450.

Woodruff v Parham, 73 U. S. 145, 146.

Howe Machine Co. v Gage 100 U. S. 679.

Robbins v Shelby Taxing District, 120 U. S. 599, 500, 501.

12 Corpus Juris page 27, sec. 25, and notes 2, 31.

That appellant's complaint made this discrimination a ground for claiming the invalidity of the tax, as affecting parties within the same classification is shown by the allegations of the complaint, set forth in appellant's brief in this Court as follows:

(Brief. P. 12, Par. 3.) "That none of said persons, corporations or concerns engaged in refining gasoline and transporting and shipping the same into Montana, and in the sale thereof inside and outside of the State of Montana to their respective customers in the State of Montana BEFORE THE SAME HAS ARRIVED AND BEEN BROUGHT TO REST IN MONTANA AND THEN RESOLD, WAS REQUIRED TO PAY TWO CENTS PER GALLON AS A LICENSE TAX or any other tax upon the sale of said gasoline and distillate. (R. 5, Par. XII.)"

Also, at Page 13, Brief, Paragraph 5:

"That under said law the plaintiff is required to pay two cents per gallon license tax on each gallon sold for the privilege of conducting its business, but said competing foreign corporations, being competitors of plaintiff, solicit and ship orders to dealers and non-manufacturing distributors and consumers in plaintiff's territory, and SELL SAID

PRODUCTS BEFORE THEY ARRIVE AND ARE BROUGHT TO REST IN THE STATE OF MONTANA, AT A PRICE OF TWO CENTS PER GALLON LESS THAN THE MARKET PRICE, by deducting two cents per gallon which plaintiff is required to pay under said law, but which neither said competitors, dealers, non-manufacturing distributors nor consumers are required to pay on such as is transported from without the state AND IS NOT RESOLD AFTER BEING BROUGHT TO REST IN MONTANA. (R. 6, 7. Par. XVIII.) That by reason of this discrimination of two cents per gallon the plaintiff is unable to compete in its territory with said corporations from other states in securing the business of non-manufacturing distributors, dealers, users and consumers.

This is further referred to in appellant's argument at Page 27 of appellant's brief as follows:

> "This law requires the Montana refiner to pay two cents per gallon on all gasoline and distillate he manufactures and sells."
>
> "It does not require such tax on such as is shipped by distributors or dealers in Montana, from sister states, until it is SOLD, after it is brought to rest in Montana."

This Court, in its opinion in this case said:

> But because the state legislature could have laid a tax upon the use of the commodity as well as upon its sale, it by no means follows that a failure to do so constituted a discrimination forbidden by the equal protection clause of the 14th Amendment. That clause does not prohibit classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, *provided that the classification rest upon a substantial difference so that all persons similarly circumstances will be treated alike.* . . . . . It is enough if all included in the same class are treated alike."

But under said 1925 tax, as it stood, parties within the classification affected are not treated alike but there were discriminations vitally affecting the equal application of the tax within such classifications.

There are two classes affected under this law, (1) Sellers; who constitute the parties who sell gasoline, which includes the Montana refiner, the foreign refiner, who sells in Montana and the distributor in Montana who sells imported gasoline in Montana, and (2) Consumers: who constitute parties who consume gasoline purchased either from the Montana refiner, or the imported gasoline. Within these respective classifications the 1925 tax has permitted drastic, unjust and arbitrary discriminations.

In so far as the Legislature considered it had authority, without violating the commerce provision of the Federal constitution, it was the intention of said law that the consumer should be the one upon whom the burden of the tax would eventually fall. It was the consumer of the gasoline who would use the roads and highways. The tax was imposed for the express purpose of constructing and maintaining roads and highways. This being the case the consumers constituted one class affected by the tax, and all consumers in Montana must be included therein.

Under this tax there was a discrimination and inequality as between the members of the classification of consumers, and of sellers. A consumer who bought gasoline refined in Montana, or from a distributor who sold gasoline imported or shipped from a sister state, *after* it was brought to rest in Montana, had to bear the the tax.

A consumer who bought gasoline refined in Montana, had to have passed on to him, the two cent tax the refiner had to pay or the refiner had to pay the tax without recovering the same. If such consumer bought from a distributor who was dealing in gasoline imported from a

sister state, who sold such gasoline *after* it had been brought to rest in Montana, the consumer had to have passed on to him the two cent tax such distributor had to pay, or such distributor had to pay the tax without recovering the same. If, however, a consumer purchased gasoline from a Montana distributor who sold imported gasoline to such consumer, before the gasoline was brought to rest in Montana, such consumer did not have to have the tax passed on to him as this distributor evaded the payment of the tax and sold it tax free, and such consumer escaped the enhanced price of the added tax.

In other words, the consumer was penalized two cents a gallon for buying the Montana product or for patronizing a distributor who did not sell *until* the product had been brought to rest. The distributor who tried to evade the tax was rewarded for his subtilty, by taking the markets away from those who paid the tax, to-wit: from his brother distributor who paid the tax and the Montana refiner who paid the tax, or his competitor forced the Montana distributor or refiner to bear the tax to hold the business.

For example, take two transportation companies A, and B, competing with each other. Their entire business is the use of the highway, for the construction and maintenance of which said tax was imposed. Each has its place of business in the same city, has an equal amount invested in business, and competition is keen. Each has the same protection of the laws and use of the highways. The business consists in the transportation of freight and passengers covering the neighboring territory. If A buys gasoline produced by a Montana refiner, he is required to stand the burden of the tax; if he purchases from the distributor who sells imported gasoline, after it has been brought to rest in Montana he then has to stand the burden of the tax. If, however, B, his competitor, buys

from the distributor who deals in imported gasoline, and in order to evade the tax, sells it *before* the gasoline has been brought to rest in Montana, neither he nor the consumer has to pay the tax, and the consumer purchases his gasoline tax free, and freed from the burden of the tax; if B buys from the out of state refiner and ships to himself he pays no tax.

It is apparent that in keen competition A cannot compete with B in securing business, and he is forced to quit business, or do business under an unjust discrimination in favor of his competitor, or is driven to purchase the tax free gasoline, thus depriving the state of the revenue and the Montana refiner a customer. And Montana refiners are unjustly discriminated against in favor of imported products.

This discrimination is further shown by the following illustrations:

Tank cars or barrel lots may be shipped to Missoula from Spokane over the Northern Pacific railway, for transfer to and delivery on the Milwaukee tracks in its Missoula yards, where consumers and distributors have receptacles for receiving gasoline in car load lots. When it arrives at Missoula on the Northern Pacific railway tracks, it may be detained after such arrival until sold and paid for. Thereupon the gasoline may complete its journey and come to rest on the Milwaukee tracks in the Milwaukee yards and be received by said purchasers, tax free.

The Spokane shipper telegraphs to the Missoula distributor that on a certain day tank car and barrel lots of gasoline will reach Missoula on the Northern Pacific Railway destined for the Milwaukee yards, tax free. The distributors sell to their customers before it comes to rest in the Milwaukee yards, tax free. Also the refiner located in a sister state may establish his sales agent in the same

city with the Montana refiner, and ship his products, not bring them to a state of rest until after they are sold, then bring them to rest and deliver, tax free. It brings about the following situation:

"A". The Montana refiner produces and sells in this state 1,000,000 gallons of gasoline and distillate per year. This would require it to pay to the state a license tax of $20,000.00 per year for the privilege of conducting its business and selling its products; whereas, its competitor, B company, which manufactured 1,000,000 gallons of gasoline and distillate in an adjoining state, ships the products into this state at suitable intervals. After a shipment has reached this state and has influenced the market by being here in competition, but before coming to a state of rest, B Company, which has procured bills of lading ships its products to itself, or agent, in suitable quantities for sale to consumers, makes sales in Montana, by its agent, of said gasoline to consumers, tax free, receives payment, assigns the respective bills of lading to the respective purchasers for consumption, then the product is brought to a state of rest, and is received by the consumers, and B Company is not required to pay any license tax whatever, and the Montana refiner is deprived of the business, and is unable to compete for the business, or he must bear the burden of the tax without recovering it from the consumer, if he holds the business.

It was the clear intention of the Montana legislature to pass the burden of the tax to the consumer of gasoline. It was not their intention that the burden of this tax should remain on the seller. This thought is carried out from the fact that this law is a road measure and is for the purpose of raising revenue for the sole purpose of building and maintaining roads. It was assumed that the amount of gasoline consumed measured fairly the use which the consumer made of the roads. If the legislature

had laid the tax directly on the consumer all would have been well and the unjust discrimination as between consumers in the same class or between sellers in the same class would not have existed. To avoid the difficulty and expense of directly taxing the consumer, the seller was forced against his will and without remuneration to collect the tax. Furthermore if this law is held valid the seller is forced to pay the amount of the tax to the State even tho owing to tax free competition he has no power to collect same. The method used was to call the tax an excise tax applied to the Montana sale. It is obvious that under this law as framed the out of State seller and even the seller within Montana who sells before the imported gasoline comes to rest within the State, is not reached and does not have to pay the tax. These last mentioned sellers may deliver the gasoline to the consumer and the consumer does not have to stand the tax. In fact no tax is paid. If the consumer purchases from a Montana refiner or from any seller who sells after imported gasoline comes to rest in the State, the tax on the gasoline must be paid if this law is held valid. Whatever the form of the law, whatever it is called, however it is applied, it was the clear intention of the legislature to make the gasoline consumer constitute the class to finally receive the burden of the tax. If this is so it seems clear from the nature of the law and its purpose that all consumers of gasoline in Montana must be included in the class for taxation. If then those consumers who purchase from Montana refiners and sellers must bear the tax, and those consumers who purchase from out of State sellers, or from Montana sellers who sell before imported gasoline comes to rest, do not have to pay the tax, the tax is not applied equally to all in the same class. The law should be declared unconstitutional and void for this reason.

The iniquity of this discrimination between consumers

increases by its own action. From the admitted facts in this case it may be reasonably inferred that at least one third of the consumers in Montana are so situated that they can buy out of State gasoline and save the entire 2c per gallon tax. They have used the roads without being taxed for their construction and maintenance. The other two thirds because of quantity purchased, transportation costs, or other causes must buy within the State in which case they are burdened with the full 2c per gallon tax. The State then receives only two thirds of the expected revenue. The cost of the roads being a fixed sum the tax must be raised to 3c per gallon. While still placing no burden on the out of State buyers the burden on the portion of the class which must bear the tax is increased by half. This in turn induces more consumers to buy out of State with further increase of the burden of those who pay. This thought is not a mere theory as the State did actually increase the tax to 3c, but happily under a better form of law.

It is possible that because this law in an indirect manner and technically makes it appear that the seller is the class being taxed we must still retain that thought as the alternative, if the principle above presented that the consumer is the class bearing the tax is not accepted. In such case it seems that the court must follow out the intent of the legislature. Even tho the consumer did not constitute directly the class to be taxed, it was clearly the class upon which the burden of the tax was to fall. Even tho the seller then is designated as the class to be taxed, the class is not complete for the end sought, and to avoid discrimination, unless all sellers to Montana consumers are included. In their relations as sellers to Montana consumers, Montana refiners, Montana sellers and out of State sellers are all similarly circumstanced and must be included in the same class. As the law reaches only Mon-

tana refined gasoline and imported gasoline after it comes to rest, and is sold, and as it does not reach imported gasoline sold in Montana to Montana consumers before it comes to rest in the State, it is clear that the whole class is not reached. Therefore the tax discriminates as between sellers in the same class. It follows that if all in the same class cannot be reached this form of law should be declared unconstitutional and void.

This law, properly or improperly, intended to use the Montana refiners and sellers only as collectors of the tax. Its working made them pay it whether or not they collected it by allowing sellers in the same class, of out of state gasoline, to sell to consumers in Montana tax free. This law should have passed the burden of taxation to Montana consumers in the same class equally. Its working allowed consumers who bought out of State gasoline to get it free from tax burden while forcing consumers in the same class, of Montana refined gasoline to stand the entire and thereby increased burden.

A law so failing in intent and discriminating so unjustly and increasingly should not be allowed to stand.

For the foregoing reasons it is respectfully urged that this petition be granted, and that the judgment of this Honorable Court be, upon further consideration, reversed.

Respectfully submitted,

JOHN E. PATTERSON,
Counsel for Appellant.

CERTIFICATE OF COUNSEL.

I, John E. Patterson, counsel for the above-named Hart Refineries, appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JOHN E. PATTERSON,
Counsel for Appellant.